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## **The impact of secret operations on the Constitution and early Presidential Practice**

### **Abstract**

This thesis will examine the development of secret operations before and during the War of American Independence to determine the impact on the Constitution and early presidential practice. Secret operations allowed the small American army to avoid entrapment and eventually defeat an army superior in every military element. From the early disastrous spy rings like the one conducted by Captain Nathan Hale, to the sophisticated Culper Ring, the Americans developed an expertise in secret operations that had an impact on the conduct of the War of American Independence. We will trace this development along with that of the leading spymaster, General George Washington, until the conclusive Battle of Yorktown. The impact of secret operations and counterintelligence operations can be clearly seen in the debates at the Constitutional Convention as well as in the document this convention produced. The Constitution of the United States was a document itself produced in secret and bears the vestiges of the delegates' wartime experiences. Thus, their fears of foreign intrigue and penetration led to such apparently arcane elements as the Electoral College and the keeping of secret journals in the legislative branch. We will consider the presidential practice of Washington, Jefferson, and Madison in secret operations. Additionally, we will focus on the beginning of the presidential "Contingency Fund" for diplomatic missions and secret operations during the Washington Administration. We conclude by revisiting legislative oversight of current secret operations. Using the historical information previously developed, we conclude that the executive branch is better suited to conduct these operations with some congressional oversight but not a veto.

# The impact of secret operations on the Constitution and early Presidential Practice

By Albert W. Klein, Jr.\*

This paper will trace the historical development of secret operations beginning with the period immediately prior to the Revolutionary War and continuing through America's independence. American use of secret operations began before the nation was independent. Secret operations would come to influence not only the course of the War for American Independence but also the very foundation of the nation in the Constitution and early Presidential practice. Secret operations may be considered an American tradition notwithstanding the investigations of the 1970s. By necessity, a great deal of historical background is needed to develop the framework of the American experience in

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\* The opinions expressed in this article are those of the author and do not reflect the official position of the Department of Defense, the Department of the Air Force, or the Judge Advocate General's Department.

the Revolutionary War and the Constitutional Convention. This paper will analyze the Convention and the Constitution and provide an overview of the Presidencies of Washington, Jefferson, and Madison. We will then consider how we use these historic lessons.

Few historians have written about the early American secret operations. Even fewer have examined these operations in a Constitutional context, and even then, their conclusions were general. Lawyers that have written on the background of the Constitution tend to focus more on the document itself and the legal development. This thesis will attempt to integrate the two approaches to demonstrate the impact of secret operations on the constitution and early presidential practice.

## Covert Operations Prior to the American Revolution

“[I]t is virtually unknown that the shots fired that April morning on Lexington Green mark the culmination of a secret war between British and American intelligence.”<sup>1</sup> The American intelligence operatives were known as the “Sons of Liberty,” “the Liberty Boys,” or “the Mechanics.” They were “a federation of dissident political groups formed in colonial America in 1765 in reaction to the Stamp Act.”<sup>2</sup> Their methods which were viewed by the British as illegal and violent, included rioting, harassing British sympathizers called Tories, procuring arms, providing military training, and distributing anti-British propaganda. British troops occupied Boston in 1765 and suppressed opposition to Acts of Parliament, sometimes violently, such as the March 1770 shootings

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<sup>1</sup> G.J.A. O’Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Actions from the American Revolution to the CIA*, 9 (1991)

<sup>2</sup> *Id.*

known as the "Boston Massacre." The Liberty Boys conducted a raid of their own on the British arsenal at Portsmouth, New Hampshire in December 1774. After a high level British secret agent, a mole, had revealed the existence of a secret Patriot arsenal and it was seized, the Sons of Liberty formed a committee to spy on British troops and supporters. In the winter of 1774 through 1775, "members ... regularly patrolled the streets of Boston during the night to observe British military preparations...."<sup>3</sup> This early warning group would warn of subsequent raids in the Boston area including Lexington and Concord.

However, General Thomas Gage, the British commanding general in Boston, had spies of his own among the Liberty Boys that included one of their leaders. Benjamin Church, a physician, was one of the Liberty Boys' leaders and perhaps the most valuable spy the British had in America.<sup>4</sup> Paul Revere, a Liberty Boy of later fame, also had spies and realized the group had been penetrated but could not determine the identity of the mole.<sup>5</sup> Dr. Church and Gage's other spies reported the exact location of the military stores at Concord, and while the British were on the way to seize these stores, the "shot heard around the world" was fired. Church continued as a mole, even being sent to the Continental Congress, but his role as a spy was eventually discovered in August 1776. This aspect of Church's activities will be further developed later in this paper in its historical occurrence. The secret operations of the American Revolution will be considered in the next section.

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<sup>3</sup> *Id.* at 11.

<sup>4</sup> Edmund R. Thompson, Document Sheds New Light on General Gage's Informers, *Intelligence Quarterly*, Vol. 4, No. 3 at 8-10 (August 1989).

<sup>5</sup> Carl Van Doren, *Secret History of the American Revolution: An Account of the Conspiracies of Benedict Arnold and Numerous others Drawn from the Secret Service papers of the British Headquarters in North America*, 19-23 (1941).

## The American Revolution

A year and a day before the Colonies declared their independence from Great Britain, George Washington assumed command of the Continental Army near Boston.<sup>6</sup> He was a fortunate survivor of the ill-fated campaign led by General Edward Braddock against Fort Duquesne in present day Pittsburgh, Pennsylvania. The poor intelligence available to General Braddock cost him his life and nearly that of "Lieutenant Colonel" Washington.<sup>7</sup> It must be noted that even then, Washington had obtained a detailed map of Fort Duquesne.<sup>8</sup> Thus Washington's use of covert operations began early in his military career and was to remain a lifelong fascination, even as President. "A glimpse at the inventory of his military library accumulated during the years between his disasters in the French and Indian Wars and his victory in the War of Independence, reveals it to be well-based in intelligence theory."<sup>9</sup> Thus "[t]hroughout the American [sic] revolution, General Washington placed great importance on learning British intentions and shielding his own army's activities."<sup>10</sup>

Returning to 1775, within a fortnight of assuming command at Cambridge, General Washington established a secret operation against the British in Boston.<sup>11</sup> "Significantly, his first major expenditure ... was the payment of \$333.33..."<sup>12</sup> to start this operation. The objective of the operation was "to establish a secret correspondence

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<sup>6</sup> Christopher Andrew, *For the President's Eyes Only: Secret Intelligence Operations and the American Presidency*, 7 (1995).

<sup>7</sup> O'Toole, *supra* note 1 at 18.

<sup>8</sup> John S. Davidson, *Memoirs of Major Robert Stobo of the Virginia Regiment*, 20-23 (1854).

<sup>9</sup> Edward F. Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, *International Journal of Intelligence and Counterintelligence*, Vol. 1 No 1, 5 (1985).

<sup>10</sup> Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency*, 15 (1996).

<sup>11</sup> O'Toole, *supra* note 1 at 19.

<sup>12</sup> Knott, *supra* note 10 at 13.

for the purpose of conveying intelligence of the Enemy's movements and designs."<sup>13</sup>

Washington believed in controlling and personally directing his espionage operations. In fact,

[i]t was Washington who exercised total discretion over an elaborate intelligence network that penetrated major American cities under British control; in a remarkably short time, a group of individual networks—each controlled by the state within which it existed---was transformed into a centralized intelligence service equal to that of Britain, the greatest power in the world.<sup>14</sup>

This was just the beginning of elaborate secret intelligence operations during the American Revolution.

On the reverse side of the secret coin, counterintelligence, General Washington was gravely concerned about British intelligence efforts directed against his army. Both the military and civilian leaders of the Rebellion shared this fear of penetration, heightened no doubt by the now unfolding Church betrayal. On 29 November 1775, the Continental Congress established the Committee on Correspondence.<sup>15</sup> After 30 January 1776, "this committee was called the Committee on Secret Correspondence with the express purpose of obtaining foreign intelligence."<sup>16</sup> "The five Committee members...were Benjamin Franklin, Benjamin Harrison, John Jay, John Dickinson and Thomas Johnson."<sup>17</sup> Jay's work on that committee would greatly influence his views of the later Constitution and his own role as Secretary of State. One author and a former Director of Central Intelligence regard this Committee as "the distant ancestor of today's

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<sup>13</sup> Andrew, *supra* note 6 at 7.

<sup>14</sup> Knott, *supra* note 10 at 13-14.

<sup>15</sup> Central Intelligence Agency, *Intelligence in the War of Independence*, 9 (1976).

<sup>16</sup> Knott, *supra* note 10 at 15.

<sup>17</sup> CIA, *supra* note 15 at 9.



CIA [Central Intelligence Agency].”<sup>18</sup> The Committee on Secret Correspondence was one of three wartime committees having either an intelligence or counterintelligence function. The others were the Committee on Spies and the Secret Committee. The Committee on Spies was created on 5 June 1776, with the purpose of considering “what is proper to be done with persons giving intelligence to the enemy, or supplying them with provisions.”<sup>19</sup> Future Presidents, John Adams and Thomas Jefferson were members of this Committee and Jefferson would later recall the value of these secret operations. The Secret Committee created on 18 September 1775 by resolution of the Continental Congress “was given wide powers and large sums of money to obtain military supplies in secret, and was charged with distributing the supplies and selling gunpowder to privateers chartered by ...Congress.”<sup>20</sup>

At this juncture it is necessary to continue the examination of Dr. Church’s activities since it motivated the Committee on Spies to draft the first espionage act. Dr. Church was appointed by the Congress to be the Director General of Hospitals for the Continental Army.<sup>21</sup> Eventually, his mistress mishandled a cipher letter to either his brother-in-law or General Gage, the intent is unclear, that was intercepted and deciphered by two independent teams.<sup>22</sup> Despite his denials, the close of the letter- “[m]ake use of every precaution or I perish”<sup>23</sup>-gave him away. Washington ordered a court-martial and the prisoner was found “guilty of criminal correspondence with the enemy” but “the general discovered that the articles of war had no provision for a

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<sup>18</sup> Andrew, *supra* note 6 at 7. The Director of Central Intelligence was William O. Casey.

<sup>19</sup> CIA, *supra* note 15 at 10.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> CIA, *supra* note 15 at 11. See also O’Toole *supra* note 1 at 13-14

<sup>22</sup> O’Toole, *supra* note 1 at 14-15.

<sup>23</sup> *Id.*

penalty commensurate with the crime.”<sup>24</sup> The Committee on Spies forwarded their report of Church’s act of treachery to Congress and on 21 August 1776, Congress enacted the first espionage act. The Act provided

[t]hat all persons not members of, nor owing allegiance to, any of the United States of America, as described in a resolution of the Congress of the 24<sup>th</sup> of June last, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a court martial, or such other punishment as such court martial may direct.<sup>25</sup>

As to Dr. Church, he was permitted to leave the United States after serving at least a year in confinement and his ship was never heard from again.<sup>26</sup> Washington was stung by this episode and wrote “[t]here is one evil I dread, and that is, their spies.”<sup>27</sup>

Turning back to the Continental Army near Boston, Washington’s immediate need was for military intelligence and, lacking appropriate staff officers, he became his own spymaster.<sup>28</sup> This endeavor took time to implement and coordinate. The situation around Boston was stalemated until January 1776, when Washington’s spies reported British preparations for an expedition.<sup>29</sup> In February, General Henry Clinton did depart Boston with 1500 troops to attack Charleston, South Carolina. In Boston, General William Howe, having replaced General Gage as commander in chief, was planning to occupy New York City. With the arrival of American General Henry Knox and over fifty pieces of captured artillery, the stalemate at Boston was broken.<sup>30</sup> Continental artillery

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<sup>24</sup> *Id.* at p 15.

<sup>25</sup> CIA, *supra* note 15 at 11.

<sup>26</sup> O’Toole, *supra* note 1 at 15.

<sup>27</sup> Knott, *supra* note 10 at 19.

<sup>28</sup> Andrew, *supra* note 6 at 7.

<sup>29</sup> O’Toole, *supra* note 1 at 19.

<sup>30</sup> *Id.*

now dominated the heights around Boston forcing General Howe to withdraw to Halifax to prepare for the New York campaign along the Hudson Valley and Lake Champlain.

Based on intelligence gathered by his spies, Washington redeployed to the area of New York City in April.<sup>31</sup> He found the city to be a hotbed of Tory activity and rather indefensible, despite orders from Congress to hold it. In late June, when the British force of 130 ships appeared off Long Island, Tory spies escaped the land and sea patrols mounted by the Continentals to inform them of Washington's predicament.<sup>32</sup> The British began disembarking what would eventually total 31,000 troops supported by 10,000 naval personnel. Brooklyn was attacked on 24 August and by 27 August, the Continentals were caught in a trap, losing over 1500 men.<sup>33</sup> Washington evacuated to Manhattan, then to White Plains, and eventually to New Jersey.

Upon reaching Manhattan, Washington organized a "special forces" and reconnaissance unit under the command of Lieutenant Colonel Thomas Knowlton that became known as Knowlton's Rangers.<sup>34</sup> This was the first intelligence organization in the Continental Army. Their early missions were to patrol landing zones but soon expanded to active secret operations. The Rangers captured a British sloop and began sending covert operators behind British lines. Captain Nathan Hale was one of these operatives whose mission, beginning on 12 September 1776, was to determine General Howe's line of advance on Manhattan. Hale followed the British to Manhattan where he was "captured on the twenty-first while trying to return to American lines."<sup>35</sup> He was hanged on the morning of 22 September 1776. Captain Alexander Hamilton received

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<sup>31</sup> James T. Flexner, *George Washington in the American Revolution*, 90-91 (1968).

<sup>32</sup> O'Toole, *supra* note 1 at 20.

<sup>33</sup> Charles F. Adams, *Studies Military and Diplomatic 1775-1865*, 33 (1911).

<sup>34</sup> O'Toole, *supra* note 1 at 21.

this report from Captain John Montessor, General Howe's aide-de-camp under a flag of truce to discuss prisoner exchanges.<sup>36</sup> One author opines "[w]e may assume Washington realized that the life of a fine soldier had been wasted by the general ineptness of his superiors in running secret operations."<sup>37</sup> Knowlton's Rangers were wiped out to a man on 16 September 1776 at the Battle of Harlem Heights. Washington told his commanders that everything depended on intelligence, but they had been surprised and almost trapped twice in two weeks.<sup>38</sup> These intelligence debacles caused Washington to realize that the difference between victory and defeat was intelligence. For Washington, this was a hard-learned lesson, relearned, and never forgotten. Furthermore, "[a]s commander of an outnumbered, ill-equipped army, Washington resorted to time-honored techniques of deception and intrigue so often employed by smaller forces against great powers."<sup>39</sup> Thus deception and intrigue would be the strategy until the war ended with Washington fighting only when he had the tactical advantage. That advantage was most often procured through secret operations.

After the British out maneuvered and nearly destroyed Washington's army, it occupied New York City, Princeton, and Trenton sending the Continental Congress fleeing to Baltimore. Before fleeing, the Congress delegated "sweeping powers to the Board of War and General Washington..." regarding the conduct of the war.<sup>40</sup> Earlier in 1776, Congress authorized Mr. 'Rene' Mesplet, a printer, to go to Montreal to establish a pro-American press in Canada. Congress paid his expenses and a salary of \$200 for

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<sup>35</sup> *Id.* at 22-24.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 24.

<sup>38</sup> *Id.*

<sup>39</sup> Knott, *supra* note 10 at 25.

<sup>40</sup> Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power*, 21 (1976).

this propaganda effort.<sup>41</sup> He successfully began the newspaper, today called the Montreal Gazette, but the propaganda effort to have Quebec join the United States failed. Other Congressional covert efforts such as the mission of Father John Carroll to Canada to preach about the benevolence of the American Revolution and counter the preaching of British clerics likewise failed.<sup>42</sup> During 1776, the only known covert operation undertaken in Europe occurred in Great Britain. James Aitken entered Britain on a fake passport from France. Aitken, a saboteur, began his mission by setting fire to naval stores and materiel at the Portsmouth naval base. He then moved to Bristol where he burned several warehouses and private homes. Eventually, he was caught and hanged.<sup>43</sup> Congress too, was having a difficult time establishing secret operations.

A more successful psychological-warfare operation was established with Britain's Hessian troops as the target. A variety of documents were written by Jefferson, Adams, Washington, and Franklin, translated into German, and distributed. Hessians were promised tracts of land and rights as citizens for their desertion to the Continental side.<sup>44</sup> Franklin wrote a particularly helpful letter "purportedly...from a German count to the Hessian commander to run up his casualties so as to increase the count's payments from the British."<sup>45</sup> These psychological weapons eventually resulted in between five- and six thousand desertions.<sup>46</sup>

This dark episode of defeat and retreat, from July through December 1776, was lifted by one of Washington's spies, John Honeyman. He was most recently a cattle

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<sup>41</sup> Worthington Ford, ed, Journals of the Continental Congress, 1774-1789, 173 Vol. 4 (1904-1937).

<sup>42</sup> CIA, supra note 15 at 16.

<sup>43</sup> Knott, supra note 10 at 22.

<sup>44</sup> *Id.*

<sup>45</sup> Albert H. Smyth, ed, The Writings of Benjamin Franklin, 27-29 Vol. 4 (1906).

<sup>46</sup> Lyman Butterfield, Psychological Warfare in 1776: The Jefferson - Franklin Plan to Cause Hessian Desertions, Proceedings of the American Philosophical Society, 236, 240-241 Vol.3 (June 1950).

dealer and butcher but about “a year and a half earlier, ... the Irish born weaver proposed to the newly elected commander in chief that he [Honeyman] serve as Washington’s spy.”<sup>47</sup> The General accepted but had little contact with Honeyman until his sudden appearance on 22 December 1776, although Washington contacted him in mid-November 1776. Having abandoned his previous occupation as a weaver, he had become known as an ardent Tory and his new trade as a cattle dealer “enabled him to pass freely within the British lines.”<sup>48</sup> Honeyman had just come from Trenton, and there are no known records of what transpired between Washington and Honeyman. It has been surmised that

he [Honeyman] probably knew that the main British army had returned to New York to go into winter quarters, and that the Hessian commander left to occupy Trenton, Colonel Johann Rall, although a fine officer in battle had several fatal flaws.<sup>49</sup>

These three flaws were disdain for the “country clowns” under Washington, disregard for British orders to fortify his position, and finally the fact that the Colonel was a drunk. Based on Honeyman’s report, part of the Continental Army consisting of 2,400 men crossed the Delaware River to New Jersey and the day after Christmas 1776 attacked Trenton. Twenty-two Hessians were killed, including a still drunk Colonel Rall. Washington’s troops captured most of the rest without suffering any casualties. This resounding, yet minor, military victory psychologically “restored American morale, and the cause, which so recently had been called hopeless, was given new life. The tide had begun to turn, at least in part through Honeyman’s intelligence report.”<sup>50</sup> His intelligence

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<sup>47</sup> O’Toole, *supra* note 1 at 25.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 26.

network's contribution to this desperately needed victory was not lost on General Washington. The intelligence situation would begin to change in 1777.

While Washington was seeking intelligence, John Jay sought to obtain supplies and ferret out spies. In order to obtain desperately needed supplies, Jay was involved in, if not the leader of, the creation of a front company. This led him to be involved in the secret communications with Silas Deane in France and this relationship "preserved the confidentiality of some important correspondence."<sup>51</sup> Jay, working with Deane, Arthur Lee, and their French agent, Pierre-Augustin Caron de Beaumarchais, created the firm of Roderigue Hortalez et Compagnie.<sup>52</sup> While this enterprise had support from French King Louis XVI and his foreign minister, Comte de Verennes, "[t]he French government insisted on maintaining layers of 'plausible deniability,' to protect its exposure;...."<sup>53</sup> Beaumarchais created the firm based on "a \$3 million operation, \$1 million of which came from a secret donation from Spain."<sup>54</sup> America would soon be procuring supplies in quantities sufficient to make a difference in the war due in part to Jay's efforts. However, Jay was not totally happy with the results of the effort. Despite all of the precautions including use of invisible ink developed by Jay's brother, Dr. James Jay,<sup>55</sup> the British intercepted and read more than half of the correspondence.<sup>56</sup>

"Membership on the Committee of Secret Correspondence exposed Jay to some of America's most sensitive clandestine operations of the war and revealed to him the importance of secrecy in achieving foreign-policy objectives."<sup>57</sup>

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<sup>51</sup> Knott, *supra* note 10 at 29.

<sup>52</sup> *Id.* at 30.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> CIA, *supra* note 15 at 31.

<sup>56</sup> Knott, *supra* note 10 at 29.

<sup>57</sup> *Id.*

Jay was also deeply involved in counterintelligence with the Committee, later renamed, Commission for Detecting and Defeating Conspiracies. The Commission's operations were directed against so-called "intestine [internal] enemies."<sup>58</sup> "By the end of 1776, the initial ad hoc efforts against enemies of the Revolution became a full-fledged counterintelligence network with at least ten agents who operated, by and large, under the direction of John Jay."<sup>59</sup> Not only was Jay the spymaster working with famous spies, Enoch Crosby and Nathaniel Sakett, but he "often acted as chairman and appeared throughout the committee's existence to have been the dominant force in directing its activities."<sup>60</sup> The commission handled over five hundred cases of questionable loyalty and subversion in the present State of New York. The Commission "was disbanded on February 11, 1777, and replaced by a similar body of which Jay was not a member."<sup>61</sup> The trials and tribulations of working with and often leading the Commission during the war formed "Jay's belief in the need for executive discretion over matters of war and peace...."<sup>62</sup> His further conceptual development of executive discretion would harden as President of the Continental Congress and Minister to Spain.

In France the formal diplomatic commission authorized by Congress arrived in December 1776 and began to function in 1777. From the very beginning, this commission was penetrated by British Secret Service operatives. Doctor Edward Bancroft arrived in France soon after the commission. Franklin was his friend and

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<sup>58</sup> John Fitzpatrick, ed, *The Writings of George Washington from the Original Manuscripts, 1745-1799*, 266 n23 Vol 5 (1931-1944).

<sup>59</sup> Richard B. Morris, ed, *John Jay, The Making of a Revolutionary: Unpublished Papers, 1745-1780*, 331 (1975).

<sup>60</sup> Knott, *supra* note 10 at 32.

<sup>61</sup> Morris, ed, *supra* note 59 at 331.

<sup>62</sup> Knott, *supra* note 10 at 33.



mentor, but the physician was a British Secret Service agent.<sup>63</sup> Dr. Bancroft had also been a student in Connecticut of Silas Deane, another American commission member. Thus his bona fides were established by two of the three American commission members. Bancroft was employed as Franklin's secretary and advisor to the commission. Not only did he pass hundreds of documents, including the names of American agents sent to Spain, Portugal, and other potential allies, but he was also sent on "frequent secret intelligence missions across the Channel."<sup>64</sup> Arthur Lee, the third member of the commission, suspected Bancroft was a spy, just as was his own secretary, Major John Thornton, who was exposed by Franklin as "actually being a British spy—Franklin had learned this from some of his own agents in London...."<sup>65</sup> Even prior to this penetration, the British Secret Service had disrupted the sale and delivery of war materiel from the quasi-private French firm, Roderigue Hortalez et Compagnie.<sup>66</sup> Thus "Bancroft's treachery apparently went undiscovered during his lifetime...[with] his role as a British agent emerg[ing] in the 1880s."<sup>67</sup> Full disclosure will never be made as Bancroft's grandson, a British General, burned most of his papers.<sup>68</sup> The fear of foreign penetration of the government, diplomatic missions, and the military was developed early.

In early 1777, the Continental Army was quite small. Fresh from victory at Trenton and on their way to another victory at Princeton on 2 and 3 January 1777, Washington, still the underdog, had to "use intelligence to make up for his relative weakness."<sup>69</sup> To meet this requirement, Washington personally began to recruit and

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<sup>63</sup> O'Toole, *supra* note 1 at 30.

<sup>64</sup> *Id.* at 31.

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> *Id.* at 35.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 36.

organize an intelligence service in the winter of 1777, but such an enterprise was expensive. "He turned to Robert Morris, a successful Philadelphia merchant and congressman (who became known as the Financier of the Revolution)...Morris quickly came through with a bag of silver coins...."<sup>70</sup> Washington used this "hard money to pay a certain set of people."<sup>71</sup> His accounts "during the winter and spring of 1777 reflect his new emphasis on intelligence."<sup>72</sup> Washington devised two programs that year that would have significant impact on later Presidents including himself. These two programs were the use of secret funds and deleting the names of his secret agents from accountings when these were rendered. The General "sought and obtained a 'secret service fund' from the Continental Congress, and expressed preference for specie, preferably gold: 'I have always found a difficulty in procuring intelligence by means of paper money, and I perceive it increases.'"<sup>73</sup> Even with failing to list his spies "Washington was given complete discretion over the funds, with Congress accepting his accounting of expenditures."<sup>74</sup>

He also recruited new staff members, inviting "[Alexander] Hamilton to join his 'family' as an aide, with a double promotion to lieutenant colonel."<sup>75</sup> Hamilton accepted and embarked on a journey into Washington's world of secret agents and operations. This journey would affect Hamilton for the rest of his life but especially during the formation and ratification of the new Constitution. As Washington's personnel secretary, Hamilton was permitted "more than any other aide-de-camp, access to the details of American

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<sup>70</sup> *Id.* at 37.

<sup>71</sup> John Bakeless, *Turncoats, Traitors and Heroes*, 170 (1959).

<sup>72</sup> O'Toole, *supra* note 1 at 37.

<sup>73</sup> CIA, *supra* note 15 at 34.

<sup>74</sup> Knott, *supra* note 10 at 23.

<sup>75</sup> Forrest McDonald, *Alexander Hamilton, A Biography*, 14 (1978).

intelligence operations.”<sup>76</sup> He is the only known officer, other than Washington, to handle intelligence reports.<sup>77</sup> Hamilton performed at least some counterintelligence work, such as when “Washington assigned [him] the task of checking [a] man’s background....”<sup>78</sup> Hamilton provided a new source of secret information to Washington. This source was Hercules Mulligan, a New York tailor, “with whose family Hamilton had lived for eight years.”<sup>79</sup> Mulligan supplied a great deal of information to Washington and was noted as Washington’s “confidential correspondent.”<sup>80</sup> Mulligan essentially worked alone<sup>81</sup> but did cooperate with Nathaniel Sackett, Haym Salomon, and Joshua Mersereau in this early spy ring.<sup>82</sup>

It is believed that Mulligan provided the intelligence regarding General Howe’s seaborne movement toward Philadelphia.<sup>83</sup> Mulligan was quite correct in this information, but even with this advanced notice, Washington was beaten at Chad’s Ford on Brandywine Creek on 11 September 1777. “Of some eleven thousand troops Washington lost between twelve hundred and thirteen hundred at Brandywine Creek....”<sup>84</sup> Philadelphia was lost and Washington retreated to Valley Forge for the winter.

“In spite of this unhappy turn of events, Washington could at least now console himself with the foresight he had demonstrated in April, when against the possibility that Howe might occupy Philadelphia, he had ordered General Thomas Mifflin to establish stay-behind agent networks in

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<sup>76</sup> Knott, *supra* note 10 at 37.

<sup>77</sup> Bakeless, *supra* note 71 at 228.

<sup>78</sup> *Id.* at 205.

<sup>79</sup> O’Toole, *supra* note 1 at 38-39.

<sup>80</sup> Michael J. O’Brien, *Hercules Mulligan: Confidential Correspondent of General Washington*, 88-89 (1937).

<sup>81</sup> Knott, *supra* note 10 at 40.

<sup>82</sup> O’Toole, *supra* note 1 at 38-41.

<sup>83</sup> O’Brien, *supra* note 80 at 102.

<sup>84</sup> O’Toole, *supra* note 1 at 42.

that city.”<sup>85</sup>

Meanwhile, on 17 October, General Horatio Gates accepted the surrender of General John Burgoyne at Saratoga. By the diplomacy of Franklin, this victory led to the Treaty of Amity and Commerce including “provisions for a military alliance with France” signed on 6 February 1778.<sup>86</sup>

“During the terrible winter that followed in Valley Forge, Pennsylvania, Washington prepared fake documents in his own hand, full of references to nonexistent infantry and cavalry regiments, which were then passed on to the enemy by double agents.”<sup>87</sup> Washington was the master of deception and the British were taken in by his deceptions, often overestimating by a factor of two or three the size of the Continental Army. Such deception prevented attacks on his forces that winter. When Major John Clark, the spymaster for Philadelphia became seriously ill in January 1778, Washington began to run the spy ring. Even this effort did not provide the intelligence he needed as the new British commander, General Henry Clinton, began a withdrawal movement to New York City. Washington wanted to attack Clinton’s strung out columns as the British marched through New Jersey. The only battle fought during this movement was at Monmouth Court House, in extreme heat, and was a tactical draw. “Although suffering heavy losses, Clinton managed to move his army to New York. For Washington the intelligence failure resulted in a lost opportunity but not a defeat.”<sup>88</sup> Washington had learned a great deal about using spies since July 1775, and this would pay dividends in

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 33.

<sup>87</sup> Andrew, *supra* note 6 at 9.

<sup>88</sup> O’Toole, *supra* note 1 at 44.

New York where his “spies continued to operate....”<sup>89</sup> The stage was set for the Culper Ring.

Perhaps the best known of Washington’s spy rings, the Culper Ring began secret operations in occupied New York City in 1778. After a disastrous start that included the hanging of Nathan Hale, his spies in New York provided him with intelligence, counter-intelligence, an opportunity to engage in deception operations, and even kidnappings while providing for Washington’s own escape from kidnapping attempts. Major Benjamin Tallmadge organized the disparate parts of this group, known as the Culper spy ring, in 1778. “The Culper Ring was designed to avoid the pitfalls of the Hale mission.”<sup>90</sup>

As with all of Washington’s covert operations, the Culper Ring was sworn to secrecy, so that the exact extent of all their intelligence operations remains unknown. “Tallmadge was instructed to report directly to Washington but never bring any of the agents to meet him in person, for the preservation of their secret identities was of utmost importance.”<sup>91</sup> Culper, Sr. was Abraham Woodhull, a farmer, and Culper, Jr. was Robert Townsend, a merchant and Tory journalist. To preserve their identities, the agents and geographic locations were assigned three numbers. “Townsend himself was 723; Woodhull, 722; Washington, 711; Long Island, 728; Setauket, 729; and so on.”<sup>92</sup> Washington was fixated on New York and its British occupants. “Although Washington had appointed Tallmadge the case officer..., he was not always satisfied to leave the

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<sup>89</sup> *Id.* at 45.

<sup>90</sup> Knott, *supra* note 10 at 16.

<sup>91</sup> *Id.* at 16-17.

<sup>92</sup> O’Toole, *supra* note 1 at 47.

minute details of espionage trade craft to him.”<sup>93</sup> The Culper Ring employed such tools of “intelligence trade craft as codes, ciphers, and secret ink for communication; a series of couriers and whaleboats to transmit reports; at least one secret ‘safe house’; and numerous sources.”<sup>94</sup>

A stickler for security, Washington would often remind his agents by admonition,

[t]here can be scarcely any need of recommending the greatest Caution and secrecy in a business so critical and dangerous. The following seem to be the best general rules:

To intrust to no one but the persons fixed upon to transmit the Business.

To deliver the dispatches to none upon our side but those who shall be pitched upon for the purpose of receiving them and to transmit them and any intelligence that may be obtained to no one but the Commander-in-Chief.<sup>95</sup>

The exhausting efforts of establishing the Culper Ring would be of great value throughout the remainder of the war. In 1778, they provided information on the movement of General Sir Henry Clinton’s troops and plans. It may be that the Culper Ring warned Washington in 1778 that his plan to kidnap General Clinton was compromised. In fact, Hamilton participated in at least one clandestine meeting with Hercules Mulligan perhaps regarding this plot but the topic is lost to history.<sup>96</sup>

The intelligence network in New York had the misfortune to lose one of its operatives that year. Recall Haym Salomon was arrested the same day that Captain Hale was hanged. Salomon spoke six languages, including German, thus his linguistic abilities

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<sup>93</sup> *Id.*

<sup>94</sup> CIA, *supra* note 15 at 38.

<sup>95</sup> Morton Pennypacker, General Washington’s Spies on Long Island and in New York, 49-50 (1939).

<sup>96</sup> O’Toole, *supra* note 1 at 39.

“made him too valuable to hang.”<sup>97</sup> He was made an interpreter between British commanders and their Hessian troops until August 1778, when he was “accused ...of being an accomplice in a plot to burn the British fleet and to destroy His Majesty’s warehouses in the city.”<sup>98</sup> Condemned to death, he bribed his guard and escaped to Philadelphia. There he continued to fund the American cause until he died, bankrupt, in 1785 while “his government owed him more than \$700,000 in unpaid loans.”<sup>99</sup>

Washington and Hamilton were painfully aware of this and other such sacrifices. Washington appealed to Congress in September 1778 that “for want of supplies of this sort [hard money], we have been very deficient in intelligence.”<sup>100</sup> Desperate for funds, Washington began to use his “private money and unilaterally transferring funds designated by congress for other purposes, [thus he] was able to sustain his ‘essential’ intelligence operations.”<sup>101</sup> Washington continued to request money from Congress and complained about its scarcity. This was the seed for the “Contingency Fund” request that Washington made as president about twelve years later.

Congress elected John Jay as President of that body on 10 December 1778. He “was immediately confronted with a crisis over a leak of classified information.... Beaumarchais’s secret program of French assistance to the United States.”<sup>102</sup> Congress was dividing into factions, bickering constantly, and this release had serious ramifications because the French were extremely upset by the disclosure demanding discipline for the culprit. The source of this leak was Thomas Paine, the secretary of the Committee for Foreign Affairs. Jay led the inquiry resulting in Paine being dismissed after two weeks

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<sup>97</sup> *Id.* at 38.

<sup>98</sup> CIA, *supra* note 15 at 37.

<sup>99</sup> *Id.*

<sup>100</sup> Fitzpatrick, *supra* note 58 at Vol. 7, 385.

and his committee papers were demanded.<sup>103</sup> Jay was decisive but open to attack by Paine and his supporters. This and other experiences as President of the Continental Congress "reaffirmed Jay's belief in the inherent weakness of legislative bodies to direct national affairs with the necessary attributes of secrecy and dispatch."<sup>104</sup> Jay also tried to keep money for intelligence flowing to Washington, and he seemed to be more involved in intelligence operations. "Jay's three years' experience as an intelligence and counterintelligence manager seems to have led him to a greater involvement in these matters."<sup>105</sup> 1779 would mark the beginning of the transition towards independence.

1779 began with the return of a paroled American agent, Lieutenant Lewis J. Costigan. He had been "sent to New York as a prisoner, and was eventually paroled under oath not to attempt escape or communicate intelligence."<sup>106</sup> Lt. Costigan had actually been exchanged in September 1778, however, "he did not leave New York, and until January 1779 he roamed around the city in his American uniform, gathering intelligence while giving the impression of being a paroled prisoner."<sup>107</sup> Costigan and the Culper Ring helped Washington to maintain the stalemated military situation around the city.

Meanwhile, John Jay sent General Washington as much money for intelligence as was possible. Jay remained involved in intelligence and counterintelligence through his correspondence with Washington and a mutual respect developed. Another example of Jay's familiarity with American intelligence operations can be found in his authorization

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<sup>101</sup> Knott, *supra* note 10 at 24.

<sup>102</sup> *Id.* at 33.

<sup>103</sup> *Id.* at 33-34.

<sup>104</sup> *Id.* at 34.

<sup>105</sup> *Id.*

<sup>106</sup> CIA, *supra* note 15 at 39.

<sup>107</sup> *Id.*



to Washington “to draw on the treasury for 2,000 guineas for secret service activities on May 4, 1779.”<sup>108</sup> The Continental Congress was becoming rather jealous of “executive control of intelligence activities”<sup>109</sup> and wanted the General to explain his need for the money. This was voted down perhaps due to “the Adams-Morris faction [seeking] to enhance the discretion of the commander-in-chief in controlling intelligence operations.”<sup>110</sup>

In France, Franklin and the Marquis de Lafayette devised a plan “of fomenting a revolt among the Presbyterian Ulstermen, who were sympathetic to the American Revolution.”<sup>111</sup> Their agent, Dr. Bancroft, was sent to Ireland to ascertain the possibilities of this venture but “he reported that the time was not ripe, and the project was scrapped.”<sup>112</sup> Franklin seemed intent on taking covert action in England. Based on this, it is not surprising to learn that “[a]n invasion of England was actually in the planning stages by the French during 1779 but was abandoned in October as impractical.”<sup>113</sup> To further complicate the situation, Spain declared war on Britain on 29 June 1779.<sup>114</sup> Spain had an agent in Philadelphia, Don Juan de Miralles Trailhon, who “quickly gained the confidence of many of the Revolutionary leaders, including Washington.”<sup>115</sup> His reports “were optimistic regarding American prospects....”<sup>116</sup> This had the “salutary effect for the American military situation: it revived the centuries-old British fear of a Spanish invasion of England, and thereby kept a large part of Britain’s sea power on the eastern

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<sup>108</sup> Knott, *supra* note 10 at 35.

<sup>109</sup> *Id.* at 23.

<sup>110</sup> *Id.*

<sup>111</sup> O’Toole, *supra* note 1 at 35.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 52.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

side of the Atlantic.”<sup>117</sup> It should be noted that Spain, unlike France, was not an ally of the Americans. Spanish military efforts were concentrated on “the recovery of Gibraltar and the acquisition of new footholds along the Mississippi and the Gulf of Mexico.”<sup>118</sup> The Culper Ring quickly noted the catastrophic psychological effect of Spain’s entry into the war. A report of Culper, Jr., dated 29 June 1779 read, “[w]e are much alarmed with the prospect of a Spanish war—should that be the case, I fear poor old England will not be able to oppose the whole but will be obliged to sue for peace.”<sup>119</sup>

Events in Europe were coalescing towards American independence. Due in part to the plan to invade England, the French reluctantly took the “step of sending a large expeditionary force to fight under Washington.”<sup>120</sup> This new state of affairs ended Jay’s term as President “on September 28, 1799 when he accepted the appointment as minister to Spain.”<sup>121</sup> He gladly left a Congress that was “crippled by factional strife from within and subject to a variety of unseemly influences from without.”<sup>122</sup> Jay realized the importance of foreign relations and he appreciated the intelligence concomitant with secrecy that was required to successfully engage in international affairs. Regarding this intelligence and secrecy, Jay believed “[t]he fewer Parties [involved] the better.”<sup>123</sup> In foreign relations,

Jay’s diplomatic career reinforced his belief that large bodies of decision makers impeded the smooth and steady implementation of policy. The goals of American foreign policy were undermined continually by a congressional—committee system characterized by unsteady administration.<sup>124</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 51.

<sup>119</sup> Pennypacker, *supra* note 95 at 247.

<sup>120</sup> O’Toole, *supra* note 1 at 52.

<sup>121</sup> Knott, *supra* note 10 at 35.

<sup>122</sup> *Id.* at 35.

<sup>123</sup> Morris, ed, *supra* note 59 at 581.

<sup>124</sup> Knott, *supra* note 10 at 35.

He became personally aware of British intelligence in Spain as “[h]is every move was carefully monitored....”<sup>125</sup> Jay took careful precautions since “[m]ail openings, counterfeiting, disinformation, and the ‘turning’ of agents were common occurrences in the diplomatic world of eighteenth-century Europe.”<sup>126</sup> He knew some of his letters were being read by at least British intelligence and perhaps other intelligence services. The American Revolution was entering the crucial end stages as 1779 came to a close.

1780 was a year of high intrigue by all sides in the war. The British knew, probably through Bancroft, that General Comte de Rochambeau and his troops were headed for America. “On July 10, 1780, General Rochambeau landed at Newport, Rhode Island, with a force of seventy-six hundred French troops.”<sup>127</sup> The British intended to attack them at Newport but were delayed in embarking partly due to damage inflicted on their barges by saboteurs. The Culper Ring, destined to have a year rich in exploits, reported this to Washington but he could not move to assist Rochambeau.<sup>128</sup> “Thus forewarned, Washington succeeded in planting bogus papers on British spies that described his (in reality, nonexistent) preparations for an offensive against New York.”<sup>129</sup> Washington feigned toward New York and General “Clinton promptly recalled his troops to New York, leaving the French unmolested.”<sup>130</sup> The Culper Ring’s reports saved the French troops that would assist the next year in the Battle of Yorktown.

The Culper Ring is better known in 1780 for its outstanding counterintelligence work in identifying the traitor, Major General Benedict Arnold and his British contact,

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 35-36.

<sup>127</sup> O’Toole, *supra* note 1 at 52.

<sup>128</sup> Andrew, *supra* note 6 at 10.

<sup>129</sup> *Id.*

<sup>130</sup> O’Toole, *supra* note 1 at 54.

Major John Andre. The Benedict Arnold story is well known but only an esoteric group knows the counterintelligence effort behind it. Arnold was an American hero, having been an early patriot from the raid with Ethan Allen on Fort Ticonderoga through his serious wounding at Saratoga. He was promoted to Major General and given command over the strategic area around West Point. In August, his planned defection began to unfold. He requested the names of the Culper Ring, explaining in this letter,

[a]s the safety of this post and garrison [West Point] in a great measure depends on having good intelligence of the movements and designs of the enemy, and as you have been fortunate in the agents you have employed for that purpose, I must request, with their permission, to be informed who they are, as I wish to employ them for the same purpose.<sup>131</sup>

Arnold's request was denied. Curiously, Tallmadge received an order on 13 September from Arnold regarding the safe conduct to Arnold of a man named James Anderson.<sup>132</sup> On 21 September, a man named James Anderson had been caught in Westchester with "some suspicious papers in his boots."<sup>133</sup>

Anderson was brought to Lieutenant Colonel John Jameson at North Castle, where, fortuitously, Tallmadge stopped later that week. Prior to Tallmadge's arrival, Jameson sent a report to both Washington and Arnold. Further, the prisoner was sent to Arnold. Tallmadge pleaded with Jameson to give the matter to him and eventually Jameson agreed to send a rider after the party and return Anderson. However, Jameson insisted that the report go on to General Arnold.<sup>134</sup> Anderson admitted he was "Major

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<sup>131</sup> Pennypacker, *supra* note 95 at 121.

<sup>132</sup> *Id.* at 117.

<sup>133</sup> O'Toole, *supra* note 1 at 54.

<sup>134</sup> *Id.* at 55.

John Andre, Adjutant General to the British Army.”<sup>135</sup> Tallmadge knew Washington was to meet with Arnold but the report had a three-day head start. In fact, “Washington was virtually on his doorstep when Arnold galloped off toward the Hudson River and the British ship that would take him to the safety of New York.”<sup>136</sup> Finally the messenger from Jameson arrived later that day. “Tallmadge may have suspected Arnold, Washington had not, and he was stunned.”<sup>137</sup>

Andre was tried by a fourteen-member board composed of general officers, convicted of spying, and sentenced to be hanged. Washington notified Clinton who was thunderstruck since he viewed Andre as a son. Clinton immediately replied that Andre had entered under a flag of truce at the invitation of General Arnold. Washington permitted a brief reprieve to hear additional arguments from “a deputation of three British officers....”<sup>138</sup> Washington was unconvinced but offered Andre to Clinton, “if Clinton traded Arnold for him.”<sup>139</sup> On 2 October 1780, Andre was hanged. The Culper Ring had supplied some important background information to Tallmadge regarding this defection.

Washington became fixated on Arnold. Major Henry “Light Horse Harry” Lee offered Washington a bold kidnapping plan. “Lee’s sergeant major, John Champe was assigned to this special mission and on the evening of October 19, 1780, ‘deserted’ to the British under a hail of gunfire.”<sup>140</sup> Arnold established Champe’s bona fides and appointed him as sergeant major in Arnold’s so called “American Legion” made up of American deserters. Champe made contact with American agents and the kidnapping plan was set into motion. Unfortunately, Arnold and his troops made a hasty embarkation for Virginia

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<sup>135</sup> Benjamin Tallmadge, *Memoir of Col. Benjamin Tallmadge*, 36 (1858, reprinted 1968).

<sup>136</sup> O’Toole, *supra* note 1 at 56.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 57.

that night ending this kidnapping operation.<sup>141</sup> There were two later kidnapping efforts directed against Arnold, one of which was authorized by Governor Thomas Jefferson after “this greatest of all traitors”<sup>142</sup> burned Richmond.

In February 1781, Alexander Hamilton resigned as Washington’s aide-de-camp after three years of service.<sup>143</sup> Hamilton was Washington’s most trusted aide and spymaster, even taking over during Washington’s many absences.<sup>144</sup> Meanwhile Washington’s fixation with Arnold led to another attempt to return the traitor to American control. In March 1781, Arnold was to be captured “during his daily ride to the Virginia shore of the Chesapeake Bay [but this] was foiled by the chance anchoring of some British ships in the area.”<sup>145</sup> Arnold left America in 1781 for exile in London where he died in 1801.

John Jay’s continuing pleas for “congressional action to secure the privacy of American [diplomatic] communication came up for debate in March 1781.”<sup>146</sup> The resolution laid out the problems that Jay wrote about but consideration of the resolution was delayed. Jay was not surprised but his frustration was growing.

Military operations, specifically a combined American and French attack on New York, were being planned. However, “[c]aptured American dispatches in the early summer of 1781 had alerted Clinton to Washington’s original plan....”<sup>147</sup> Washington was alerted to the capture of his plans by either the Culper Ring or Mulligan or perhaps

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<sup>139</sup> *Id.*

<sup>140</sup> CIA, *supra* note 15 at 18.

<sup>141</sup> *Id.*

<sup>142</sup> Willard S. Randall, *Thomas Jefferson: A Life*, 334 (1994).

<sup>143</sup> McDonald, *supra* note 75 at 23.

<sup>144</sup> Knott, *supra* note 10 at 38.

<sup>145</sup> CIA, *supra* note 15 at 18.

<sup>146</sup> Knott, *supra* note 10 at 36.

<sup>147</sup> Andrew, *supra* note 6 at 10.

both. Upon learning that “Admiral de Grasse was moving his fleet not to New York but to the Chesapeake Bay,”<sup>148</sup> Washington changed his plans. The master of deception built a Headquarters with “a large bakery, knowing that Clinton’s secret service would report it....”<sup>149</sup> He arranged for “an ostentatious display of French troops along the Jersey Palisade, their distinctive white uniforms easily visible across the river in New York.”<sup>150</sup> Washington, besides obtaining boats for a river crossing, “arranged for false dispatches, indicating that his objective remained New York, to fall into the hands of British spies.”<sup>151</sup> Clinton was deceived, “[e]ven when Clinton’s spies discovered from the mistress of General Rochambeau’s son that the French army was moving south, he at first refused to believe it.”<sup>152</sup> In fact, Clinton was so thoroughly deceived that “[i]t was not until three weeks after the American army marched through Philadelphia that the British realized the troops were heading for Yorktown.”<sup>153</sup> Included in this march south was Colonel Hamilton who had obtained a field command.

Deception continued up to the siege of Yorktown that began on 6 October 1781. James Armistead, pretending to be a runaway slave, was taken to Cornwallis and recruited to spy for the British. Lafayette returned Armistead to Cornwallis with “a fabricated order that supposedly was destined for a large number of patriot replacements—a force that did not exist.”<sup>154</sup> Next deception turned to the “deserter” Charles Morgan, who informed the British of the large number of boats available to the Franco-American forces “sufficient ... to move all [their] troops against the British in one

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<sup>148</sup> O’Toole, *supra* note 1 at 59.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 60.

<sup>151</sup> Andrew, *supra* note 6 at 10.

<sup>152</sup> *Id.*

<sup>153</sup> Bakeless, *supra* note 71 at 36.

<sup>154</sup> CIA, *supra* note 15 at 22.

landing operation.”<sup>155</sup> These deceptions pinned the British down in Yorktown. The final battle began with Hamilton leading one of two simultaneous assaults on the Redoubts, numbers 9 and 10, at Yorktown on the night of 14-15 October 1781.<sup>156</sup> This sealed the fate of Cornwallis and he agreed to surrender his forces two days later.

The next two years were spent negotiating the peace; however, the British still occupied many areas including New York City. In March 1782, Washington authorized a kidnapping attempt against King George III’s son and Admiral Digby while they were visiting New York.<sup>157</sup> Colonel Mattias Ogden masterminded the plan and implemented its execution. The operation was well under way when it was called off due to a compromise resulting in a doubling of the Prince’s guard.<sup>158</sup> Washington wanted “a prestigious bargaining chip, perhaps looking forward to a prisoner exchange involving the hated Benedict Arnold.”<sup>159</sup> Thus ends the known secret operations of the American Revolution.

### The Constitutional Convention, the Constitution, and Ratification.

The Constitutional Convention was held in Philadelphia in the summer of 1787. It did not begin well, as it “had been scheduled to convene on the second Monday of May, only a few delegates were actually on hand at the appointed time.”<sup>160</sup> Other delegates “continued to straggle into the Convention during the next two months.”<sup>161</sup> These delegates however, “constituted as distinguished a body of statesmen as America could

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<sup>155</sup> *Id.*

<sup>156</sup> McDonald, *supra* note 75 at 25.

<sup>157</sup> Knott, *supra* note 10 at 20.

<sup>158</sup> *Id.* at 21.

<sup>159</sup> *Id.*

<sup>160</sup> Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development*, 107 (1976).

<sup>161</sup> *Id.* at 108.



have brought together nearly all of America's great men of the day being present."<sup>162</sup>

Fifty-five delegates at one time took part in the Convention and their names are familiar.

What may not be familiar are their respective backgrounds in the covert operations of the American Revolution.

In addition to the more notable veterans [of American intelligence operations], such as Washington, Franklin, and Hamilton, several other delegates... had strong intelligence backgrounds. Among them were Jonathan Dayton of New Jersey, a former field intelligence officer, and John Dickinson of Delaware, a member of the Secret Committee of the Continental Congress, which obtained military materiel covertly by flying foreign flags on its supply ships-often without the permission of the nation whose flag they flew. Prominent Pennsylvania delegate James Wilson was a former member of the Committee on Spies and helped draw up the nation's first espionage laws. During the war, Wilson had served with Franklin and George Wythe on a special committee created to examine intercepted British communications. William Churchill Houston of New Jersey and Robert Morris of Pennsylvania were former members of the Committee of Secret Correspondence. Morris had also played a critical role in obtaining specie to finance intelligence operations. Two other Pennsylvanians, Major General Thomas Mifflin and Gouverneur Morris, were intimate participants in wartime intelligence activities. Mifflin had been a central figure in directing a portion of Washington's military intelligence network, and Morris had participated in counterintelligence activities and would go on to become President Washington's first agent abroad. Elbridge Gerry of Massachusetts had deciphered the secret correspondence used by British agent Benjamin Church in the first year of the war. Additionally, nine other delegates had served on various state committees of safety charged with a number of minor intelligence functions.<sup>163</sup>

Of the fifty-five delegates participating in the Constitutional Convention, at least twenty had been directly involved in secret operations during the American Revolution. This group of secret operators was not an "intelligence lobby," yet "it is safe to assume that

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<sup>162</sup> *Id.* at 113.

their experience inclined them toward the idea of a broad grant of executive discretion in controlling secret initiatives.”<sup>164</sup>

Let’s consider the main areas where the Constitutional Convention was influenced by the previously noted Revolution’s secret operations and the continuing foreign intrigues against the United States. “The dominant intelligence-related issue discussed at the Constitutional Convention was the likelihood of foreign penetration.”<sup>165</sup> To place this issue into context, this paper will review the events from the end of the American Revolution through the Constitutional Convention.

After the American Revolution, General Washington’s secret operators returned to their primary occupations. However, “Britain, Spain, and France, continued to conduct espionage and covert political operations in the United States.”<sup>166</sup> Britain was still very interested in her former Colonies and believed eventually the Colonies would return to British control. Overtly, Britain isolated her former Colonies politically and economically—even militarily. Politically, Britain disrupted American diplomatic efforts by refusing to exchange diplomatic representatives and

[w]hen John Adams, American Minister to England, sought a commercial treaty with Britain, Foreign Secretary Charles James Fox contemptuously suggested that ambassadors from the thirteen states ought to be present, since Congress [under the Articles of Confederation] had no authority over the subject.”<sup>167</sup>

Further, Britain imposed economic sanctions by closing her Canadian and West

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<sup>163</sup> Knott, *supra* note 10 at 42-43.

<sup>164</sup> *Id.* at 42.

<sup>165</sup> *Id.* at 43.

<sup>166</sup> O’Toole, *supra* note 1 at 69.

<sup>167</sup> Kelly and Harbison, *supra* note 160 at 102.

Indies ports to American commerce.<sup>168</sup> Militarily, the British “had continued to keep troops [and forts] on American soil in violation of the Treaty of Peace.”<sup>169</sup>

Covertly, “[t]he British had by far the most extensive intelligence apparatus, reaching into almost every corner of the new Republic and deep into the national government.”<sup>170</sup> The operations of General Guy Carleton, Governor General of Canada, and his diplomat without portfolio, Lieutenant Colonel George Beckwith, were played out in New York City, the capital and “especially in such sensitive areas as Vermont, the borders of Florida and Louisiana, and the territories of Kentucky and Tennessee.”<sup>171</sup> These British intrigues were both pervasive and influential. While the Constitutional Convention was meeting, General Carleton had posted Beckwith to New York City. In fact, during the ratification process, Carleton’s secret agent in Kentucky, John Connolly, a Pennsylvania-born Tory, was in

Louisville supplied with funds and authority to offer Kentuckians British troops and equipment to open the Mississippi River as a commercial route between the frontier and world markets. In exchange for this aid, Kentucky was to leave the American confederation and bear allegiance to Britain.<sup>172</sup>

British covert operations continued on well after the Jefferson presidency.

Spain was not to be outdone in these covert operations. “Beginning in 1786 and continuing for more than twenty years, Spain conducted a series of unsuccessful intrigues aimed at promoting the secession and annexation of these [western territories].”<sup>173</sup> These covert operations were run out of Spanish New Orleans and the diplomatic mission in the

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<sup>168</sup> O’Toole, *supra* note 1 at 69.

<sup>169</sup> Richard B. Morris, *Witnesses at the Creation: Hamilton, Madison, Jay, and the Constitution*, 148 (1985).

<sup>170</sup> O’Toole, *supra* note 1 at 69.

<sup>171</sup> *Id.* at 71.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 77.

United States. The Spanish employed Americans to do their covert bidding. One of these agents, James Wilkinson of Maryland, began to operate in Kentucky during the Constitutional Convention. According to the 1787 plan accepted by the Spanish Governor of Louisiana, Estabén Miro, Kentucky would be annexed by Spain in return for free navigation on the Mississippi River.<sup>174</sup> Eventually this operation failed but Spanish intrigues continued in Louisiana and Florida through the Jefferson presidency. French covert operations are less well known during the Confederation period but their presence is not doubted due to their later intrigues.

There were also rumors abounding about the upcoming Constitutional Convention. President of Congress, and Constitutional Convention delegate, Nathaniel Gorham reportedly contacted Prince Henry of Prussia regarding the establishment of a limited monarchy in the United States. There was a report that Frederick, Duke of York, and second son of King George III, had been invited to be the king. All of these rumored cabals caused John Jay to send a letter to Washington on 25 July 1778, "proposing in the form of a question, 'whether it would not be wise and reasonable to provide a strong check to the admission of foreigners into the administration of our national government.'"<sup>175</sup>

Against this background of history, foreign intrigues against the United States, and internal rumors, this paper will next analyze the Constitution being prepared at the Convention and the ratification process relying on "The Federalist" for detail. The analysis will proceed in the numerical sequence of the Constitution.

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<sup>174</sup> *Id.*

<sup>175</sup> Morris, *supra* note 169 at 191.

The Constitution of the United States begins with a statement explaining why a constitution is necessary. Only six reasons are listed in the Preamble; “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of liberty....”<sup>176</sup>

The six aims in this preamble can be divided into two groups of three each. The first included forming a more perfect Union, insuring domestic Tranquility, and providing for the common defense. These are related immediately to the central and dominant issue of the ratification controversy. They are discussed at length,...The emphasis on order, strength, and stability is in part the result of Hamilton’s conception of the nature and purpose of government, but it is also attributable to the circumstances of the time...”<sup>177</sup>

This paper will examine each of these three phrases, in turn, where foreign intrigue was suggested or considered by the Founders.

A more perfect union was considered necessary for protection and safety from both overt and covert foreign intrigues. The Federalist is replete with constant reminders of foreign intrigues, even on subjects where this would not be expected. John Jay in “The Federalist,” Number 3 indicates “[a]mong the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first.”<sup>178</sup> He continues on that security is necessary for the maintenance of the peace “as well as against dangers from foreign arms and influence....”<sup>179</sup> As we have seen from his previous experiences in secret operations, Jay was aware of both dangers. He firmly believed a “United America” would tend “to preserve the people in a state of

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<sup>176</sup> U.S. Const. preamble.

<sup>177</sup> Benjamin F. Wright, ed, *The Federalist: The Famous Papers on the Principles of American Government*, 15 (1996).

<sup>178</sup> *Id.* at 97.

<sup>179</sup> *Id.*

peace with other nations.”<sup>180</sup> Disunity, according to Jay, was tantamount to inviting war, especially due to the close proximity “of Spanish and British territories, bordering on some States....”<sup>181</sup>

He continues this theme in his next paper when he wrote “[i]t is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it,....”<sup>182</sup> For Jay, war include clandestine operations and rejecting the call for separate confederacies concluded “[l]et candid men judge, then, whether the division of America into any given number of independent sovereignties would tend to secure us against the hostilities and improper interference of foreign nations.”<sup>183</sup> Thus, there is the reference to an overt action, war, coupled with a direct announcement of covert operations directed against the United States. As previously noted, Jay was, by experience, the most knowledgeable about foreign affairs of the three Federalist writers. His own experience in Spain caused him to understand what he termed “improper interference of foreign nations.”

The phrase “insure the domestic Tranquility” may certainly be viewed as an indication of possible foreign penetration in the government under the existing Confederation. The mere titles of the next several Federalist papers written by Hamilton, “Disunion and Dissension among the States,” “Causes of War Among the States if Disunited,” and “Consequences of War between the States” indicates the great fear of division especially influenced by foreign intrigues. Jay includes this very thought in “The Federalist,” Number 4 and mentions that the states may be “played off against each other

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<sup>180</sup> *Id.* at 98.

<sup>181</sup> *Id.* at 99.

<sup>182</sup> *Id.* at 101.

<sup>183</sup> *Id.* at 108.

by the three [Britain, France, and Spain]....”<sup>184</sup> As noted above, all three of these nations were heavily involved in secret operations of their own in America at the time the Federalist papers were written. The Framers fear of foreign intrigue was based on their current situation and, even in retrospect, this seems well founded.

Madison writes several times in “The Federalist,” Number 43 about foreign penetration of America. He opines that “the intrigues and influence of foreign powers” may plague the general government.<sup>185</sup> Madison worries, in written form, that disunion could result in some future insurrectionary force receiving “secret succor from foreign powers.”<sup>186</sup> Hamilton too, foresees an increase in attempts by foreign powers to penetrate the government, especially the more successful America becomes in the future. He writes in “The Federalist,” Number 59,

[i]t ought never to be forgotten, that a firm union of this country, under an efficient government, will probably be an increasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will originate in the intrigues of foreign powers, and will seldom fail to be patronized and abetted by some of them.<sup>187</sup>

To these Federalist writers, foreign intrigues could upset and destroy the domestic Tranquility.

Hamilton and Madison, albeit to a lesser degree, had argued for a strong national government to provide for the common defense and this continued in “The Federalist.” One of the core reasons for this type of government was a common defense against foreign penetrations. In Number 15, entitled “Defect of the Confederation” the reader was again reminded of outside interference. Hamilton wrote,

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<sup>184</sup> *Id.* at 104.

<sup>185</sup> *Id.* at 312.

<sup>186</sup> *Id.* at 313.

[a]bandoning all views towards a confederate government, this would bring us to a simple alliance offensive and defensive; and would place us in a situation to be alternate friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us.”<sup>188</sup>

On a different subject, regarding commerce and a navy, in “The Federalist,” Number 11 he reminded the reader that a commercial America “has already caused excited uneasy sensations in several of the maritime powers of Europe.”<sup>189</sup> With America as a trading and shipping competitor, “[i]mpressions of this kind will naturally indicate the policy of fostering divisions among us,...”<sup>190</sup> To overcome the current foreign interference with trade carried in American ships and the fostering of divisions among us, the common defense theme was suggested again. The recommendation is that “[a] further resource for influencing the conduct of European nations towards us, in this respect, would arise from the establishment of a federal navy.”<sup>191</sup> Hamilton concluded by writing “[l]et Americans disdain the instruments of European greatness!”<sup>192</sup> Thus the theme of foreign overt and covert threats resonates throughout “The Federalist.”

Moving on to the first Article of the Constitution, we will consider those sections and clauses having caused a discussion at the Convention of some sort of foreign intrigue. Article I, Section 2 elaborates on the qualifications to hold office in the House of Representatives. That section provides

[n]o Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he

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<sup>187</sup> *Id.* at 397-398.

<sup>188</sup> *Id.* at 159.

<sup>189</sup> *Id.* at 136.

<sup>190</sup> *Id.* at 137.

<sup>191</sup> *Id.* at 138.

<sup>192</sup> *Id.* at 142.



shall be chosen.<sup>193</sup>

In August 1787, during the Constitutional Convention, Elbridge Gerry made a motion that Representatives should be confined to the native born. He stated,

[f]oreign powers will intermeddle in our affairs, and spare no expense to influence them. Persons having foreign attachments will be sent among us & insinuated into our councils, in order to be made instruments for their purposes. Every one knows the vast sums laid out in Europe for secret services.<sup>194</sup>

Hamilton opposed this “anti-foreigner” motion and was seconded by Madison but the motion was defeated seven States to four.<sup>195</sup> “Throughout the debates, the dangers of foreign interference led certain delegates to propose rigid measures to prevent foreign-born citizens holding congressional office.”<sup>196</sup> Eventually, however, the Section appeared in its current form, yet it reflects the fear of foreign penetration. This section’s clarity was forcefully restated by Hamilton in “The Federalist” when he wrote that “[t]he qualifications of the person who may ... be chosen ... are defined and fixed in the Constitution, and are unalterable by the legislature.”<sup>197</sup> So clear was this section that until the Civil War, both Houses of Congress agreed that “membership could not be enlarged by statute or practice.”<sup>198</sup>

The States were prohibited from enlarging the qualifications for this office. The House of Representatives even seated a member-elect that met the Constitutional requirements but not the state qualifications, the latter being resolved unconstitutional by

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<sup>193</sup> U.S. Const. art. I, s 2.

<sup>194</sup> James Madison, Notes of the Debates in the Federal Convention of 1787, 437 (1987).

<sup>195</sup> *Id.* at 438.

<sup>196</sup> Knott, *supra* note 10 at 45-46.

<sup>197</sup> Wright, *supra* note 177 at 402.

<sup>198</sup> Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, 102 (1973).

the House.<sup>199</sup> Congress, itself, muddled the clear waters of this textually sound section during the Civil War by enacting a statute requiring members to take a loyalty oath of never being disloyal to the United States.<sup>200</sup> Additional silt was added in the Fourteenth Amendment, Section 3 to preclude those who had previously sworn an oath to the United States and then “engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.”<sup>201</sup> Magnanimously, a two-thirds vote by both Houses of Congress could remove such a disability. On these two bases, several members-elect were denied seats. The clarity of this section was not restored until nearly a century later when the Supreme Court decided the case of Powell v. McCormack.<sup>202</sup> In that decision, the Court indicated that Article I, Section 2 of the Constitution contained three qualifications. Congress is limited to these qualifications in judging the credentials of its members under Article I, Section 5. Clearly, the Framers’ purpose of preventing foreign penetration of the national government worked well through this Section.

Similar qualifications for Senators are set out in Article I, Section 5, Clause 3. Specifically, “[n]o Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine years a Citizen of the United States....”<sup>203</sup> The debate held on 9 August 1787, again focused on the balance of permitting talented foreigners to serve in the highest levels of government or precluding them completely to prevent foreign penetration of that government.<sup>204</sup> The participants reiterated their concerns over foreign penetration, with Messrs. Charles Pinckney and Pierce Butler strongly recommending a

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<sup>199</sup> *Id.*

<sup>200</sup> Act of 2 July 1862, 12 Stat. 502.

<sup>201</sup> U.S. Const. amend XIV, s 2.

<sup>202</sup> 395 U.S. 486 (1969).

<sup>203</sup> U.S. Const. art. I, s 5, cl. 3.

<sup>204</sup> Gaillard Hunt and James B. Scott, eds., *Debates in the Federal Convention of 1787 Reported by James Madison*, 366-370. (1920).

long period of citizenship prior to being qualified for such a high office. Madison was opposed to incorporating such language in the Constitution, but he was concerned about the efforts of foreign governments to penetrate our government. Suffice it to say, the debate that day was full of concern over foreign penetration and the use of such words during the debates as “cabal,” “foreign attachments,” and “peculiar danger” serves to emphasize the point.

In “The Federalist,” Number 62, Madison wrote that senatorial qualifications of more advanced years and a longer period of citizenship were due to “senatorial trust” requiring greater knowledge and stable character. Even Madison could not overcome his own fears of foreign penetration and that became apparent. Those possessing this “senatorial trust” will be, he expounded, “participating immediately in transactions with foreign nations, [and this trust] ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education.”<sup>205</sup> Perhaps the most revealing sentence regarding Madison’s aforementioned fear is the one explaining the citizenship qualifications. That sentence provides,

[t]he term of nine years appears to be a prudent mediocrity between total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.<sup>206</sup>

Concern about foreign penetration can not be doubted. Yet, Madison’s explanation is a compromise between three positions espoused during the Convention, namely that of Jay and Gerry questioning any participation by any “foreign born” citizen, the position of Messrs. Hamilton and Wilson, both “foreign born” arguing for almost complete

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<sup>205</sup> Wright, *supra* note 177 at 407.

<sup>206</sup> *Id.*

inclusion, and the middle ground articulated by Messrs. Franklin and Randolph for a reasonable time of citizenship.<sup>207</sup> Interestingly, no Supreme Court cases could be located on this point that might further elucidate this Clause.

Article I, Section 5, Clause 1, has been previously mentioned in connection with qualifications. The point of contention regarding secret operations was Clause 3. That clause requires “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, except such Parts as may in their Judgment require Secrecy.”<sup>208</sup> Veterans of the Continental Congress did not seem offended by the secrecy of the Congressional Journals provision. Indeed during the Revolutionary war, not only were members of Congress and government employees sworn to secrecy but “[t]he Congress also extended the umbrella of confidentiality to its secret journals. It sheltered sensitive intelligence [including counterintelligence] and foreign relations matters in this way.”<sup>209</sup> The debate covered parts of two days in August. The controversy surrounding the secrecy of Congressional Journals erupted not over the secrecy but rather over grants of legislative powers.<sup>210</sup> The clause as it is written today was presented by Messrs. Madison and Rutledge, yet voted down, initially. Some delegates led by Mason and Elsworth were against any secrecy while others led by Gerry and Sherman wanted to establish limitations by permitting publication “except such as relate to treaties & military operations.”<sup>211</sup> James Wilson, a former covert operator, rose to the defense of secrecy and reminded the assemblage that the secrecy clause was in the existing Articles of

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<sup>207</sup> Madison, *supra* note 194 at 418-419.

<sup>208</sup> U.S. Const. art. I, s 5, cl. 3.

<sup>209</sup> Sayle, *supra* note 9 at 6.

<sup>210</sup> Sofaer, *supra* note 40 at 30.

<sup>211</sup> Hunt and Scott, eds., *supra* note 204 at 380.

Confederation and should be retained in the Constitution.<sup>212</sup> Mr. Sherman agreed that both houses “might be trusted in this case if in any.”<sup>213</sup> Thus in two separate votes, one on the clause as written up to the secrecy provision and the other on the secrecy provision itself, the clause was accepted as we see it today. During the ratification process, Patrick Henry was vehemently opposed to this “dark veil of secrecy.” He conceded that “military operations and affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish published till the end which required the secrecy should have been effected.”<sup>214</sup> George Mason objected preferring the words of the Articles of Confederation, requiring monthly publication of the Journal “except such parts thereof relating to treaties, alliances, or military operations.”<sup>215</sup> Again, there are no Supreme Court cases on the secrecy provision to provide any further guidance.

Let’s turn to Article II of the Constitution to explore the impact of foreign intrigues on the powers and election of a President as well as the qualifications of that office. This paper will consider Section I, Clauses 1, 2, and 3 of Article II. Consideration of Clause 3 will rely on the original text although it has been superceded by the Twelfth Amendment to the Constitution.

Section 1, Clause 1, provides “[t]he executive Power shall be vested in a President....”<sup>216</sup> At the Constitutional Convention the concept of an executive and the powers attendant to that office were often, and hotly, debated. These debates began because “[a]ttitudes were slow to come to light, partly because delegates were loath to

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<sup>212</sup> *Id.* at 381.

<sup>213</sup> *Id.*

<sup>214</sup> Sofaer, *supra* note 40 at 53.

<sup>215</sup> Art. Of Confed. art II, para 7.

speaking their minds and partly because, at first, no one knew how far the convention would go in departing from the Articles of Confederation.”<sup>217</sup> As the role of the executive branch was being debated “only tentative resolutions were adopted, pending settlement of the structure of the legislature.”<sup>218</sup> Specific to the executive branch, on 1 June 1787, the Convention considered Virginia Resolution 7 providing “that a national Executive be instituted, to be chosen by the national Legislature—for the term of \_\_\_\_ years & to be ineligible thereafter, to possess the executive power of Congress...”<sup>219</sup> Charles Pinckney urged a “vigorous Executive” but not an elected monarchy.<sup>220</sup>

James Wilson stunned the Convention when he rose after Pinckney to move that “the Executive consist of a single person.”<sup>221</sup> “He did not say a ‘President of the United States.’ ...Always they referred to a chief executive or national executive, whether plural or single.”<sup>222</sup> Madison noted the mood, writing “[a] considerable pause ensuing...”<sup>223</sup> So long a pause caused the chairman to ask if he should put the question to a vote.<sup>224</sup> Franklin requested further sentiments on a point of such importance. Rutledge encouraged frank disclosure of the assembly’s opinion and they should not feel locked into a position by such disclosure. He continued, “[a] single man would feel the greatest responsibility and administer the public affairs best.”<sup>225</sup>

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<sup>216</sup> U.S. Const. art. II, s 1, cl. 1.

<sup>217</sup> Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, 242 (1985).

<sup>218</sup> *Id.* at 242-243.

<sup>219</sup> Hunt and Scott, eds., *supra* note 204 at 37.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787*, 54 (1966).

<sup>223</sup> Hunt and Scott, eds., *supra* note 204 at 37.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 38.

The debate began in earnest with the only point of unity being that “[a]lmost all the delegates agreed that there must be an executive branch, independent from the legislative and judicial branches.”<sup>226</sup> These tortuous debates reinforce “the belief that foreign powers would continually attempt to interfere” and this “was the paramount intelligence issue discussed at the Constitutional Convention and in the *Federalist*.”<sup>227</sup> Throughout this early debate, James Wilson argued for a single executive; a bold concept developed during his years as a member of the Committee on Spies and the special committee examining intercepted British messages. The Committee on Spies had always acted “if nothing else, bold.”<sup>228</sup>

Thus the delegates divided into two camps regarding the executive branch. “[O]ne group represented by Sherman, Dickinson, and Martin, believed in a weak executive, chosen by and responsible to the legislature....”<sup>229</sup> They supported the doctrine of legislative ascendancy and that view would color all further debate. The other group, “led by Wilson, Madison, Gouverneur Morris, and Hamilton, believed in a powerful independent executive,...”<sup>230</sup> somehow chosen by the people.

Having debated but not resolved anything the discussion turned to the question of how to elect the executive. Again, James Wilson proposed a system of electors but the motion was defeated. After many more heated debates and four more specific defeats of the electoral system, Elsworth proposed again that the executive “be chosen by electors

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<sup>226</sup> McDonald, *supra* note 217 at 240.

<sup>227</sup> Knott, *supra* note 10 at 44.

<sup>228</sup> McDonald, *supra* note 40 at 45.

<sup>229</sup> Kelly and Harbison, *supra* note 160 at 124.

<sup>230</sup> *Id.*

appointed, by the Legislatures of the States....”<sup>231</sup> Both Elbridge Gerry and Gouverneur Morris took this motion up the next day, 20 July.

While the concern over the office and powers of the President are understandable enough, it appears odd that the Founding Fathers repeatedly debated the manner of electing the President. “The creation of the electoral college was in part the result of this concern over clandestine foreign intervention in the American electoral process.”<sup>232</sup> This conclusion is based on the records of the debates. Historians generally relate that the Electoral College was “a compromise device, adopted to meet the objections which various delegates had raised to the other methods of election [by the Senate, by the States, and popular election].”<sup>233</sup> The concern of foreign penetration is an area just beginning to be examined. In this further pursuit, let’s examine the debates at the Convention.

On 18 June, Hamilton warned, “the weak sides of the Republics was their being liable to foreign influence and corruption.”<sup>234</sup> The next day, Madison questioned whether the New Jersey plan will “secure the Union against the influence of foreign powers over its members.”<sup>235</sup> Concerns of this nature erupted on 30 June when Gunning Bedford of Delaware lambasted the delegates from the large states that if they dissolved the Confederation, “the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.”<sup>236</sup> Despite his immediate rebuke, “Bedford’s outburst had forced into the open an issue that was at the back of everyone’s

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<sup>231</sup> Madison, *supra* note 194 at 286.

<sup>232</sup> Knott, *supra* note 10 at 45.

<sup>233</sup> Kelly and Harbison, *supra* note 160 at 126.

<sup>234</sup> Madison, *supra* note 194 at 136.

<sup>235</sup> Hunt and Scott, eds., *supra* note 204 at 124.

<sup>236</sup> *Id.* at 199.



mind: the dangers of foreign intervention and foreign bribes....<sup>237</sup> Bedford's frame of reference seems to be overt diplomatic and military intervention, but secret operations cannot be entirely ruled out judging by the responses. Madison, in debating the issue of electors, referred to the foreign threat "[t]he Ministers of foreign powers would have and make use of, the opportunity to mix their intrigues & influence with the Election."<sup>238</sup> Later that same day, Pierce Butler reminded the delegates "[t]he two great evils to be avoided are cabal at home and influence from abroad."<sup>239</sup> The idea was taking hold, eventually, the Electoral College plan was adopted on 6 September, quite late in the Convention.

During the ratification process, Hamilton wrote in "The Federalist," Number 68 entitled "the Method of Electing the President" that

[n]othing was more to be desired than that every practical obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government Might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all dangers of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men. Who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the sole and temporary purpose of making the appointment. ... Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias.<sup>240</sup>

<sup>237</sup> Bowen, *supra* note 222 at 132.

<sup>238</sup> Hunt and Scott, eds., *supra* note 204 at 319.

<sup>239</sup> *Id.* at 321.

<sup>240</sup> Wright, *supra* note 177 at 441-442.

Permeating the convention and ratification process of the Constitution were these references to foreign cabal, influence, intrigue and penetration. Clearly these secret operations were on the minds of the Founding Fathers for them to establish such a complex manner of electing a President.

Recurring themes of “anti-foreigner” and fear of foreign intrigues are found later in Article II, Section 1. The qualifications for President are provided there as

[n]o person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall have not attained the Age of thirty five Years, and been fourteen Years a Resident within the United States.<sup>241</sup>

The age and length of citizenship are extended compared to both the House and the Senate requirements. More significant from the foreign penetration perspective is the President must either be born in the United States or a citizen thereof at the time of the ratification of the Constitution. Having previously debated the citizenship requirements, there were few debates about this prospect. The second phrase was known as the “savings clause” because it “opened the door to such foreign-born and highly qualified Americans as... Alexander Hamilton,...James Wilson,...and ... Albert Gallatin,...”<sup>242</sup> When other qualifications were being considered, George Mason proposed that no creditors of the United States could run for office. The response to this is the only time in the Constitutional Convention that the “Contingency Fund” was mentioned. Gouverneur Morris responded,

[t]he proposed regulation would enable the Gov[ernment] to exclude particular persons from office as long as they pleased. He mentioned the case of the Commander in

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<sup>241</sup> U.S. Const. art. II, s 1, cl. 5.

<sup>242</sup> Morris, *supra* note 169 at 192.

Chief's presenting his account for secret services, which he said were so moderate that every one was astonished at it; and so simple that no doubt could arise on it. Yet had the Auditor been disposed to delay the settlement, how easily might he have effected it,....<sup>243</sup>

The landed and monied qualifications were deleted shortly afterwards.

The debate regarding the treaty power in Article II, Section 2, Clause 2, brought to the forefront the need for secrecy, raising again the possibility of foreign penetration, intrigue, influence, or a combination of all three. When James Wilson proposed both Houses of Congress vote on treaties, "[t]he circumstances of secrecy in the business of treaties formed the only objection."<sup>244</sup> Sherman thought the Senate could be trusted and "the necessity of secrecy in the case of treaties forbade a reference to the whole Legislature."<sup>245</sup> Interestingly the President was not included in the treaty making function until 7 September, quite late in the Convention.<sup>246</sup>

If the constitutional clause intended that the Senate was to be involved throughout the treaty making process, John Jay had other ideas. Drawing on his extensive background in foreign affairs, secret operations, and the domestic paralysis during his days in the Continental Congress, he wanted an almost exclusive presidential role. In "The Federalist," Number 64 entitled "The Senate and the Treaty Power," Jay spent more time writing about the President and placing the President consistently before the Senate in concept and when they were mentioned together. Presidential control of the process,

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<sup>243</sup> Hunt and Scott, eds., *supra* note 204 at 327.

<sup>244</sup> *Id.* at 528.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

argued Jay, would not miss the opportunities “we heretofore have suffered from the want of secrecy and despatch.”<sup>247</sup> His vast experience is brought to bear when he continues,

[t]hose matters which in negotiations usually require the most secrecy and the most despatch, are those preparatory and auxiliary measure which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the President will find no difficulty to provide....<sup>248</sup>

A single executive with assistance from executive agents and a State Department can best control the intelligence business and foreign affairs, respectively. Jay explained,

[i]t seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate despatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but would not confide in that of the Senate, and still less in that of a large Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.<sup>249</sup>

Presidential initiative and leadership in both intelligence and treaty-making seem to have been launched from this passage. Let’s consider how the early Presidents viewed their secret operations powers.

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<sup>247</sup> Wright, *supra* note 177 at 423.

<sup>248</sup> *Id.*

## Early Presidential Practice

When Washington was elected President, his style of executive leadership had already spanned eight years as the “executive” General waging the Revolutionary War. “As president of the United States from 1789-1797, Washington took personal responsibility for foreign intelligence.”<sup>250</sup> “The importance Washington placed on secret agents during the Revolutionary War was later reflected in his inclusion of a request for a secret fund in his first annual message to Congress.”<sup>251</sup> This fund was similar to that provided to him by the Continental Congress to run his wartime intelligence operation. As President, he wanted these funds to conduct intelligence operations including the more traditional diplomatic functions.<sup>252</sup> However, as President Washington wanted “[a] stable fund at the executive’s disposal [to] prevent the problem of erratic funding that had haunted [him] throughout all his wartime operations.”<sup>253</sup> This competent fund, better known as the Contingency Fund, “became an important tool for presidential control of foreign-policy making.”<sup>254</sup>

During the rather limited debates about “the Contingency Fund” two things became apparent. First, intelligence operations were considered to belong to the executive, and second, the President could keep intelligence operations secret even from the Congress. In the debates, it was agreed that “[t]he question under consideration was of an executive nature.”<sup>255</sup> There were some congressmen that believed one House or the other should be consulted on the uses of the “Contingency Fund.” Congressman Benson

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<sup>249</sup> *Id.* at 422.

<sup>250</sup> Andrew, *supra* note 6 at 11.

<sup>251</sup> Knott, *supra* note 10 at 49.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

of New York indicated “the Constitution does not appear to trust that equal confidence in the Senate; for it gives the President the first and greatest influence.”<sup>256</sup> Madison echoed “that the President ‘alone’ could better perform the [intelligence] function.”<sup>257</sup> In fact, Washington had already sent a foreign intelligence agent abroad. Gouverneur Morris had been sent to London on 13 October 1789 and this operation was the first of many. The Morris mission was sent by Washington “without prior congressional notification and committed his administration to pay \$2,000 without any congressional funds designated for such a purpose.”<sup>258</sup> Thus Congressman Benson was quite correct, although unaware of the situation, when he stated in the debates that “many officers may be established in the diplomatic line without being concerned with making treaties.”<sup>259</sup>

After discussion on parts of three days by the House of Representatives in January 1790, the Senate secrecy rules we invoked. The legislation was passed on 1 July 1790. The President could spend up to \$40,000 per year on the personnel serving the country abroad and this included intelligence agents. As to accounting for this fund to Congress, the President needed only to reveal so much as “in his judgment may be made public.”<sup>260</sup> What resulted “ [i]n essence, the president was granted an exemption from one of Congress’s most impressive powers: the oversight of expenditures.”<sup>261</sup> Professor Sofaer concluded “[t]he President could therefore hire special agents, or pay for secrets, or support other sensitive activities without revealing his conduct.”<sup>262</sup> As to the Morris

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<sup>255</sup> Annals of Congress, 1st Cong., 1<sup>st</sup> sess. at 1124-1125 (hereinafter Annals).

<sup>256</sup> *Id.* at 1124.

<sup>257</sup> Knott, *supra* note 10 at 52.

<sup>258</sup> *Id.* at 53.

<sup>259</sup> Annals at 1124.

<sup>260</sup> *Id.* at 2292.

<sup>261</sup> Knott, *supra* note 10 at 54.

<sup>262</sup> Sofaer, *supra* note 40 at 80.

mission, the first under the new Constitution, "Congress was not formally notified of the...mission until February 14, 1791."<sup>263</sup>

The "Contingency Fund" would grow extensively under Washington. Amazingly,

[b]y the third year [of Washington's Presidency] it had risen to one million dollars, or 12 percent of the national budget. Much of the money was for ransoming American hostages held in Algiers, for paying off foreign officials and, in effect, 'buying peace.'<sup>264</sup>

President Washington remained a stickler for secrecy much as he had been as General. He not only withheld information from Congress "but the Department of State and the secretary himself [Thomas Jefferson] were often 'out of the loop.'<sup>265</sup> "For example, Washington carried on an extensive "private" correspondence with Gouverneur Morris during the latter's service...as special agent."<sup>266</sup>

The Washington Presidency continued a great deal of his wartime secret operations. Thus, during the Washington Presidency, the "Contingency Fund," the use of special or secret agents, notification of Congress after intelligence operations were completed, and keeping his own secretary and Department of State out of secret intelligence operations became tools of the Presidency. Professor Corwin emphasized that the "Contingency Fund" uniquely demonstrates the notion of the president's prerogative in all facets of foreign relations.<sup>267</sup>

Next, we consider some of secret operations of the Jefferson Presidency.

"Thomas Jefferson's postwar career as an American diplomat exposed him to the world

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<sup>263</sup> Knott, *supra* note 10 at 53.

<sup>264</sup> Sayle, *supra* note 9 at 9.

<sup>265</sup> Knott, *supra* note 10 at 56.

<sup>266</sup> Sofaer, *supra* note 40 at 78.

<sup>267</sup> Edward S Corwin, *The President's Control of Foreign Relations*, 65-66 (1917).

of European power politics and demonstrated to him the benefits that could accrue from secret operations.”<sup>268</sup> Jefferson became the third President on 4 March 1801. The Pasha of Tripoli declared war on the United States in May 1801. Again, “Jefferson’s diplomatic experience in the 1780s had convinced him that military force was the only way to deal with the Barbary states.”<sup>269</sup>

The American Consul in Tripoli, James Cathcart, at the behest of William Eaton, the Consul in Tunis, wrote to Secretary of State Madison in July 1801 about a covert operation. This plan aimed at “dethroning the present Bashaw [Pasha], and effecting a revolution in favor of his brother, Hamet, who is at Tunis and thereby insure the United States the gratitude of him and his successors.”<sup>270</sup> The war with Tripoli was sporadic until the frigate, U.S.S. Philadelphia, ran aground in Tripoli’s harbor and the crew of 308 taken hostage. The covert plan was agreed to when “Eaton met with Jefferson in the White House on December 10, 1803.”<sup>271</sup> Eaton was removed from the State Department payroll and sent to the Department of the Navy. Secretary of the Navy, Robert Smith, placed Eaton under the command of “Commodore Samuel Barron, the commander of the Mediterranean Fleet....”<sup>272</sup>

Eaton put together a misfit army primarily made up of Arab and Greek mercenaries, seven U.S. Marines, and one midshipman to attack Derna and eventually Tripoli.<sup>273</sup> The operation to cross five hundred miles of desert began on 6 March 1805. “Hamet and Eaton arrived at Derna on April 25 and attacked it two days later, taking

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<sup>268</sup> Knott, *supra* note 10 at 63.

<sup>269</sup> Robert J. Allison, *The Crescent Obscured: The United States & The Muslim World, 1776-1815*, 25 (1995).

<sup>270</sup> Knott, *supra* note 10 at 73.

<sup>271</sup> *Id.* at 75.

<sup>272</sup> O’Toole, *supra* note 1 at 99.

<sup>273</sup> *Id.* at 100.



complete control of the city by April 29.”<sup>274</sup> Commodore Barron called off further operations while a peace treaty was being agreed upon and because Barron feared “the pasha’s threat to kill the hostages if the operation continued.”<sup>275</sup> Eaton, the Marines, and Hamet and his immediate entourage were secretly exfiltrated “leaving behind most of the motley army to fend for itself.”<sup>276</sup> Eaton’s operation had impressed the Pasha and, in part, contributed to the peace treaty. The Congressional critics did not “raise any Question, however, concerning the legality or propriety of the joint action with Hamet....The only significant complaint heard...was that the President reneged on his alliance with Hamet , not that he had made one.”<sup>277</sup>

Jefferson sought to expand the boundaries of the United States and “there is no question...that he utilized the resources of secret agents to assist in that effort.”<sup>278</sup> In 1793, as Secretary of State, Jefferson pushed the “botanical” expedition of Andre Michaux.<sup>279</sup> This mission, authorized by the Secretary of State not the President, was to attack Spanish possessions in the Louisiana Territory. Fortunately, nothing came of this mission, yet it set the stage for other infiltration and reconnaissance missions into the territories of nations with whom the United States was at peace. The best known of these was the Lewis and Clark expedition. Plans for this secret reconnaissance mission began in 1802 “as Jefferson began taking steps to acquire at least part of the Louisiana Territory from France.”<sup>280</sup> The President “requested funding for their mission in a secret message to Congress on January 18, 1803...[Jefferson] emphasized its commercial and scientific

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<sup>274</sup> Knott, *supra* note 10 at 76.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 77.

<sup>278</sup> *Id.* at 66.

<sup>279</sup> *Id.* at 67.

<sup>280</sup> *Id.* at 68.

benefits....”<sup>281</sup> However, “by the time the expedition penetrated the Louisiana Territory in 1804 it had been purchased by the United States.”<sup>282</sup>

Jefferson kept probing into the Red and Arkansas Rivers, respectively, intruding on territory Spain claimed was not part of the Louisiana Territory. The purpose of these expeditions was clear, “Secretary of War Dearborn had suggested secret reconnaissance activities on February 26, 1805, to obtain military intelligence.”<sup>283</sup> Such activities into Spanish territory were well underway when “Jefferson asked Congress to authorize the exploration of the Red and Arkansas rivers.”<sup>284</sup> Eventually, one expedition under Captain Zebulon M. Pike surrendered to Spanish troops in Spanish territory. The Administration had paid for this expedition and subsequent Spanish claims out of War Department funds designated for other projects. Congress had refused to appropriate money for this specific expedition. As to the Louisiana Purchase, if Spain had resisted, Jefferson’s “America would resort to force, but in a surreptitious manner.”<sup>285</sup>

Jefferson added to the presidential repertoire of secret operations several notable accomplishments. During his administration there occurred the first attempt by America to overthrow another government, albeit, one the United States was at war with at the time. Next, is the secret reconnaissance by undercover military expeditions into other nations’ territory during peacetime. Lastly, Jefferson’s “penchant for operations that concealed American involvement in a controversial foreign-policy initiative”<sup>286</sup> was introduced into presidential operational options.

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<sup>281</sup> *Id.*

<sup>282</sup> Sofaer, *supra* note 40 at 204.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 205.

<sup>285</sup> Knott, *supra* note 10 at 69.

<sup>286</sup> *Id.* at 70.

Finally, we examine the secret operations of the Madison Presidency. Madison was “groomed for the presidency, by serving as Secretary of State in the administration that preceded his election.”<sup>287</sup> He appreciated secrecy in executive activities and “[d]uring Madison’s administration, intelligence and other government secrets gained the added protection of formal document classification; ‘secret,’ ‘confidential,’ and ‘private.’”<sup>288</sup> The father of the Constitution, “James Madison, eagerly embraced covert operations as a tool of Executive foreign-policy making.”<sup>289</sup> Madison’s appreciation for secret operations extended beyond intelligence operations to “the case of West Florida, to help bring about American objectives.”<sup>290</sup>

Let’s consider the “West Florida revolt.” Upon assuming the presidency, Madison was informed that “West Florida,” an area between the Mississippi and Perdido Rivers [approximately from present day Pensacola, Florida to Baton Rouge, Louisiana] “was ripe for takeover by the United States.”<sup>291</sup> As Secretary of State, Madison had claimed this area was included in the Louisiana Purchase; yet it remained in Spanish hands. The secret operation had been planned and movement had occurred prior to the “official” presidential approval in January 1810.

There were “a large number of American settlers in West Florida.”<sup>292</sup> Madison was about to exploit their presence and “[w]ithout congressional mandate, through the unilateral exercise of executive power, Madison dispatched secret operatives....”<sup>293</sup>

Robert Smith, now Secretary of State, wrote to one of the more prominent settlers “that in

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<sup>287</sup> Sofaer, *supra* note 40 at 230.

<sup>288</sup> Sayle, *supra* note 9 at 10-11.

<sup>289</sup> Knott, *supra* note 10 at 87.

<sup>290</sup> Sofaer, *supra* note 40 at 264.

<sup>291</sup> *Id.* at 292.

<sup>292</sup> Irving Brant, *James Madison: The President, 1809-1812*, 178 (1941-1961).

<sup>293</sup> Knott, *supra* note 10 at 89.

the event of a political separation from the parent Country [Spain], their incorporation into our union would coincide with the sentiments and policy of the United States.”<sup>294</sup> Based on this and the activities of the secret operatives, the settlers began to vent “their dissatisfaction with Spanish rule in a series of meetings in late June and July.”<sup>295</sup> The whole operation had to appear to be “spontaneous.” This eventually led “in late September to a military assault against Spanish forces by the ‘insurgents’ and finally to a request for annexation by the United States.”<sup>296</sup> Madison promptly but secretly claimed the territory on 27 October 1810 “for the United States as part of the Louisiana Purchase.”<sup>297</sup>

Meanwhile, the Secretary of State had been busy assuring the Spanish consul general in Baltimore of the peaceful intentions of the United States being overcome by these rogue settlers and soldiers of fortune, who would be punished if apprehended in the United States. Smith continued this charade with the French Ambassador, General Louis Turreau. Congress was left “out of the loop” by Madison’s repeated actions to suppress “until mid-December any public mention of his October 27 proclamation authorizing American authorities to take control of the region.”<sup>298</sup> The annexation was presented to Congress and the Europeans as a “fait accompli.”<sup>299</sup> Due to the spectacular success in West Florida, these same tactics were to be employed in East Florida, with less success.

Madison’s annexation plans were interrupted by the War of 1812. During that war “a successful, if unholy, alliance was made with gangsters of the period for intelligence

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<sup>294</sup> Sofaer, *supra* note 40 at 294.

<sup>295</sup> *Id.* at 295.

<sup>296</sup> Knott, *supra* note 10 at 91.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 92-93.

<sup>299</sup> Brant, *supra* note 292 at 189.

purposes.”<sup>300</sup> The United States was trying to hold the city of New Orleans and protect the Louisiana Purchase. This seemed impossible as the coasts of Maine, Massachusetts, and Connecticut had been raided, and even Washington, D.C., had been abandoned to the British. In the latter case, the British had torched “the Capitol, the White House, and other public buildings before withdrawing....”<sup>301</sup> Knowing these facts, General Andrew Jackson “utilized the resources of Jean Lafitte to scout, to spy, and occasionally to fight for the United States.”<sup>302</sup> Lafitte and his men were pirates; enlisted to perform missions that Jackson and his men could not or would not accept. The British were defeated and New Orleans saved. “In 1815, as a reward for their efforts on behalf of the United States, Lafitte and his men were given full pardons for their past activities by President Madison....”<sup>303</sup> For the first time, America publicly acknowledged its association with scoundrels for secret operations.

President Madison was a fiery republican revolutionary, and he wanted to spread the word. He used “[t]he operations of Joel Poinsett in Latin America...to assist the cause of republican government by removing the presence of Old World powers from the Americas.”<sup>304</sup> Poinsett’s operations “followed the by-then well-established pattern of vaguely worded presidential instructions coupled with loose supervision of the...agent’s subsequent activities.”<sup>305</sup> His mission lasted nearly four years while he interjected himself into the internal politics of three nations—Argentina, Chile, and Peru. Due to his exploits and success in Chile, that operation will be considered.

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<sup>300</sup> Sayle, *supra* note 9 at 11.

<sup>301</sup> O’Toole, *supra* note 1 at 93.

<sup>302</sup> Knott, *supra* note 10 at 105.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 107.

<sup>305</sup> *Id.*

Poinsett began his mission in the fall of 1810 travelling as a British merchant on a British ship to Buenos Aires. His mission there was successful "in arranging for favorable commercial terms for the United States, [but] his efforts to arrange a complete break from Spain were resisted."<sup>306</sup> Seeking more favorable conditions, Poinsett went to Chile where his "skills at revolutionary agitation and counterinsurgency met their greatest test."<sup>307</sup> Soon after arrival, he became a "councillor to the president of the junta and assisted in the drafting of the provisional constitution of 1812, a document written in his home."<sup>308</sup> From that point on, Poinsett essentially governed the junta. He devised plans for the police force, urged a declaration of complete independence from Spain, and settled intra-junta disputes, even about his own involvement. More controversially, "[w]hile serving as an agent of President Madison, Poinsett was given the rank of general in the Chilean revolutionary forces and led a charge against Peruvian royalist forces at the Battle of San Carlos."<sup>309</sup> Despite his successes, Poinsett "surreptitiously...[left] for the safety of Argentina in April 1814."<sup>310</sup> He was welcomed back to the United States and "[p]erhaps the most convincing evidence of the Administration's satisfaction with Poinsett's conduct can be seen in the assignments that later were sent his way."<sup>311</sup>

James Madison, as President, furnished several new tools to early presidential secret operations. Among other concepts in the "West Florida revolt," he managed the news to assure success. During the War of 1812, the United States publicly began its affiliation with whoever could aid a secret operation. Finally, with executive agents like Joel Poinsett, the United States began to "manage" the internal affairs of other nations.

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<sup>306</sup> *Id.* at 109.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 110.

<sup>309</sup> *Id.* at 110-111.

The early Presidents carried on secret operations that stretched the separation of powers concept found in the Constitution. Congress went along as “[v]irtually all requests for information were qualified, and executive withholding...consciously tolerated.”<sup>312</sup> This paper will turn next to consider the time period from about 1975 to the present.

### Congressional Oversight Revisited

American history may provide lessons to permit us to solve our current problems. These problems are twofold, first the extent of an emergent Congressional veto, not Congressional oversight, in secret operations and secondly, the pervasiveness of leaks in both the legislative and executive branches of the government. Each of these problems will be addressed in turn.

New Congressional oversight began in May 1976, with the creation of the Senate Select Committee on Intelligence, followed in July 1977, by the House Permanent Select Committee on Intelligence. This is the beginning of the legislative ascendancy in secret operations that occurred in the mid-1970s. Such ascendancy is not without costs in the essentially zero-sum game of separation of powers. Some critics of this ascendancy argued “the United States granted its legislative branch the greatest amount of control of any Western democracy over intelligence matters.”<sup>313</sup> Is there any historical precedence for these “select” committees?

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<sup>310</sup> *Id* at 111.

<sup>311</sup> *Id.*

<sup>312</sup> Sofaer, *supra* note 40 at 377.

<sup>313</sup> Knott, *supra* note 10 at 177.

The Continental Congress performed an early “executive” role in the conduct of secret operations. Before there was an executive, that Congress was running or, more accurately, attempting to run secret operations. Even members of that body, small as it was in those days, noted “[w]e agree in opinion that it is our indispensable duty to keep it [cover French supplies] secret, even from Congress.... We find, by fatal experience, the Congress consists of too many members to keep secrets.”<sup>314</sup> The smaller committees, such as the Committee on Spies, performed executive functions throughout the War for Independence, in part to keep secrets. Thus these “select” committees have a claim of historical precedence constrained only by the lack of an executive of any type.

These broad claims of oversight in the 1970s have both a formal and informal process attached to them. Consider the appropriations process, where four committees or subcommittees review, line by line, every item in the CIA’s budget. Hearings are held and even the “Contingency Reserve Fund” is examined in great detail. Admittedly, these hearings are closed, but many people are still present. Today, American intelligence finds itself in a position where “one committee, in one branch of Congress, or even one committee member, can veto a secret presidential initiative.”<sup>315</sup> If secret operations are funded, then Congress “micromanages the details of covert policies it has approved.”<sup>316</sup>

Based on the history of secret operations beginning prior to the American Revolution, considering the framing and ratification process of the Constitution, and reviewing early Presidential practice in the area, something is amiss! Oversight is not a license to copyright. Specifically, Congress does not have and should not exercise the power to manage the details of secret operations. This type of congressional activity did

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<sup>314</sup> *Id.* at 178.

<sup>315</sup> *Id.* at 176.



not work in the American Revolution, and it is not working today. Evidence of the curtailment of secret operations is found this excerpt from an interview of former DCI, James Schlesinger. He states

the present set of circumstances makes penetration of these [Middle Eastern terrorist] organizations difficult... [P]enetration can only be achieved by having an individual prove his bona fides... the individual may need to knock off a bank or some such thing... This wouldn't sit well with congressional overseers and the Washington Post.<sup>317</sup>

United States intelligence operates in a world where nasty people do nasty things. Law enforcement uses undercover officers and informants similar to the intelligence community. In law enforcement, this is seen as a necessary evil while in the intelligence field such use is evidence of "a secret government...growing like a cancer on the Constitution."<sup>318</sup>

This encroachment by Congress may well explain some of the continuing American problems in combating terrorism in the Middle East. From the 1983 bombing of the Marine Barracks in Beirut to the bombing of the United States Embassies in Kenya and Tanzania, the United States has been out-maneuvered by these terrorist organizations. Even the apparent success of the Saudi authorities in solving the Khobar Towers bombing has not aided the security of the United States in those areas or within its own borders. The point is, if you want to catch "bad guys" you may have to use "bad guys." Clearly, such a prospect makes Congress very uncomfortable and thus just as

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<sup>316</sup> *Id.*

<sup>317</sup> The MacNeil-Lehrer NewsHour, PBS (3 July 1989).

<sup>318</sup> Bill Moyers, *The Secret Government: The Constitution in Crisis*, 16 (1988).

paralyzed as the Continental Congress. Beyond that, "Congressional committees are... no place to make such high risk decisions."<sup>319</sup>

The Founding Fathers, by building a Constitution based on the concept of separation of powers, placed an inherent amount of tension between the legislative and executive branches of government. Furthermore, both the American Revolution and the framing of the Constitution occurred during a time of legislative ascendancy vis-a-vis an executive, King or President. Even the thought of a single man as executive caught the Constitutional Convention by great surprise. The existence of an executive branch owes much to Washington, Hamilton, Jay, Madison, and Wilson. The ratification process contributed to, perhaps even defined, the later functioning of the executive branch. The persuasive materials contained in "The Federalist" helped to identify and clarify the role of the executive as an entity and its relations with Congress. Significantly, the persona of Washington and his conduct as President established many of the norms accepted as "presidential."

Congress ceded powers to Washington over foreign policy, secret operations, and the "Contingency Fund." By the first several Congress's permitting the executive initiative, or at worst acquiescence to it, they appeared to have realized the need for strong executive leadership in these areas. Hardly any of the secret operations conducted by the first Presidents were protested by Congress, even when they were informed after the operation ended.

The executive branch is better suited than Congress to plan and execute secret operations. The President and his Cabinet, or even the smaller National Command

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<sup>319</sup> Knott, *supra* note 10 at 180.

Authority, is an ideal size for considering all secret operations. The vast amount of knowledge that resides in the executive branch in such operations further contributes to the proposition that the executive branch must have the lead in these operations, especially the details. Benjamin Franklin was quite correct about Congress having too many members to keep secrets. These operations and the background that brings them into play are deadly serious and need the absolute best secrecy possible. Secrecy, not constituencies, must be the watchword.

The previously mentioned informal process deserves some detail. The President must notify the "gang of eight" regarding special circumstances including secret operations. The "gang of eight" members are the Speaker of the House, House minority leader, Senate majority and minority leaders, and the chairman and ranking members of both intelligence committees. Congress must also be notified. The timing of that notification has concerned many. "President Bush agreed to give Congress notice within a 'few days' of nearly all clandestine operations and would hold back for longer periods only in the most extreme cases."<sup>320</sup> Then-Senator William Cohen indicated that the committees "would take a dim view" of any such a practice.<sup>321</sup> The Congressional threat "to go public" is also part of the informal process when secret operations do not fit the mythical view of American innocence prior to 1947. That mythical innocence has been laid bare in this work.

As shown by the historical records earlier in this study, "[f]oreign perplexities tempted, sometimes forced, even the earliest Presidents to evade Constitutional

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<sup>320</sup> *Id.* at 183.

<sup>321</sup> *Bush Agrees to Notify Congress on Covert Acts*, N.Y. Times, 27 Oct. 1989 at A-9.

limitations.”<sup>322</sup> While such purported evasions are not lightly condoned, the United States cannot afford to have the intelligence community stifled into auditing rather than acting. Congress should be notified of secret operations. The question is at what stage of the operation? Since the answer to that question is a thesis in itself, any answer will have to wait. Yet, clearly during the appropriation and intelligence hearings, Congress has a right to know what it is paying for, and the intelligence community must have some form of accountability. Even the Continental Congress received reports and accountings, albeit, some were late such as General Washington’s accounting for secret funds seven years after this money was granted.

The second of the twofold problem is the endemic epidemic of leaks. This is a broad criticism of both the legislative and executive branches. Former DCI, Stansfield Turner, summed up the situation best,

the White House staff tends to leak when doing so helps the President politically. The Pentagon leaks, primarily to sell its programs to Congress and the public. The State Department leaks when it is being forced into a policy move its people don’t like. The CIA leaks when some of its people want to influence policy but know that’s a role they’re not allowed to play openly. The Congress is most likely to leak when the issue has ramifications domestically.<sup>323</sup>

His reflection remains accurate and, here again, the lessons of American history may help solve the problem. First, it is imperative that anyone with secret information realize and understand that such information is not their property to dispose of as they wish. “Leaks are a continuing problem that the committees have had a tendency to dismiss as something ‘everybody does.’”<sup>324</sup> Similar attitudes are found in the departments of the

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<sup>322</sup> Arthur M. Schlesinger, Jr., *The Cycles of American History*, 278 (1986).

<sup>323</sup> Stansfield Turner, *Secrecy and Democracy: The CIA in Transition*, 149 (1985).

<sup>324</sup> Knott, *supra* note 10 at 177.

executive branch. An attitude adjustment is needed to that type of rationalization, especially in dealing with secret operations. The incident involving Thomas Paine provides the historical lesson that if someone divulges information on secret operations, that person is subject to dismissal. Beyond dismissal, should the disclosure result in the death of a secret operative or military member of the United States or the death of a secret source, then criminal penalties should apply. Such criminal penalties should apply to staff, former staff, and contractors of the legislative and executive branches. This is not to advocate a "States Secrets Act" as found in the United Kingdom. However, the use of some criminal penalty, in the narrow class described above, is an important tool to resolve the epidemic of leaks.

If a camel is a horse put together by a committee, then it is not hard to discern why secret operations look as they appear today. The historical basis for these problems can provide potential solutions that should be explored.